

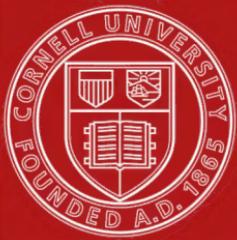
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THE
LAW OF CORPORATIONS.

A TREATISE
ON THE
LAW OF CORPORATIONS
OTHER THAN MUNICIPAL.

WITH

CITATIONS FROM THE ENGLISH AND UNITED STATES COURTS,
AND FROM THE COURTS OF EVERY STATE AND
TERRITORY IN THE UNION.

BY
Whitney
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OF TRESPASS," "SET-OFF, RECOUPMENT, AND COUNTER-CLAIM," ETC.

IN TWO VOLUMES.

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§ 175. Meaning and nature of subscription.—A subscription for shares in a corporation is a mutual promise by the subscriber to take and pay for the shares, and by the corporation to transfer them to him on such payment.¹ Stock can only be created by contract, whether it be in the simple form of subscription or in any other mode. An agree-

¹ Portland, etc., R.R. Co. v. Graham, 11 Metc. 1. The right acquired by a subscription is nothing more than the privilege of becoming a stockholder upon the payment of the money due. Coleman v. Spencer, 5 Blackf. 197; Peake v. Wabash R.R. Co., 18 Ill. 88. The promise of subscribers, though in form to take shares subscribed for by them respectively, is a promise to take and pay for the shares on the terms and conditions of the subscription paper and of the act under which the company is organized; and where the act makes the stockholders of a company individually liable for its debts, they are thus liable even though they have not paid anything on the stock or done any act to constitute them stockholders other than the signing of the subscription paper. Spear v. Crawford, 14 Wend. 20. Neither at law nor in equity are stockholders who contribute to the capital of an incorporated company individually liable for the debts of the corporation. The liability arises solely from statute, and the

rights of the party claimant must be ascertained from it. Brinham v. Wellsburg Coal Co., 47 Pa. St. 43. Where a statute provides that all the stockholders of every company incorporated under it shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, the liability thereby imposed on the stockholders is a liability arising upon contract, and is not in the nature of a penalty. The fact that the case comes to the court from a State other than that by which the corporation was created does not leave the statute open to a different construction. Flash v. Conn., 109 U. S. 371. As to subscription under the general railroad act of New York of 1850, see Black River, etc., R.R. Co. v. Clarke, 25 N. Y. 208.

ment to take it imparts to it the quality of property which before it did not possess. It is called capital stock, because the corporate capacity to create it is given. The term "stock," as used in an act of incorporation before it is taken by subscription, means nothing more than the power to receive subscriptions for stock.¹ Subscription to the capital stock of a corporation, from the membership of which a shareholder may derive pecuniary advantage, is in no sense a gift, but a promise with a consideration, and if the charter or any public statute provides that a subscriber to the stock shall pay calls made thereupon, or if he agrees to do so, he is personally liable, even though the corporation has power to forfeit his stock for non-payment. The subscription may be upon a condition precedent, in which case the signer does not become a shareholder and is not liable on his subscription until the condition has been fulfilled.² A subscription to stock must be construed as if all of the provisions of the statute affecting the liability of the subscriber or the title to the stock were incorporated in the agreement. It imports that the subscriber has taken the number of shares set opposite his name, and that he will pay for them according to the provisions of the act. The nature of the contract is that it is simply a sale of so much stock by the corporation to the subscriber, and only requires that enough shall be said or done to show that one party makes an offer which the other party accepts.³

¹ Sturges v. Stetson, 1 Biss. 246; Northern R.R. Co. v. Miller, 10 Barb. 260; Kennebec R.R. Co. v. Kendall, 31 Me. 470.

² Fort Edward, etc., P. R. Co. v. Payne, 17 Barb. 567. When the condition of a subscription is that none are holden unless the amount subscribed reaches a stipulated sum, this must be intended to mean fair subscriptions, such as may probably be collected. Middlebury College v. Will-

iamson, 1 Vt. 212. Signing articles of association which are wanting in some substantial particular is not binding upon the signer without further assent on his part, when no delegation of authority is conferred to supply the defect—as where the names of the directors are filled in after the party has signed. Dutchess, etc., R.R. Co. v. Mabbett, 58 N. Y. 397.

³ Rensselaer, etc., P. R. Co. v. Barton, 16 N. Y. 457. A promise in writ-

When stock has been once issued and afterward relinquished to the corporation, a party to whom it is then reissued becomes a stockholder as an original subscriber and not as an assignee.¹

§ 176. Form of subscription.—It is not necessary that the signatures should be made underneath a writing containing a stipulation that the subscribers are to pay the sums annexed to their names as they may be required by the president and directors of the corporation. The instrument need only indicate the intention to become stockholders, and the number of shares respectively taken by them.²

ing to take a certain number of shares becomes, by the subsequent organization of the corporation and acceptance of the subscription, a binding contract. Penobscot R.R. Co. v. Dummer, 40 Me. 172. The charter and the subscription constitute the contract between a corporation and the stockholders and determine the powers of the directors; and it is to the charter also that reference is to be made to determine the rights of the public. Stark v. Burke, 9 La. An. 341. A shareholder sustains a threefold relation: first, to the corporate body; second, to the other stockholders; and third, to the creditors of the corporation. Upton v. Englehart, 3 Dillon, 496.

¹ Mann v. Cooke, 20 Conn. 178. A corporation, under its common law power to contract, may make a valid agreement to compensate a person for obtaining subscriptions to its stock, and if such subscriptions are obtained and accepted by the company, it will be liable pursuant to the contract. Cincinnati, etc., R.R. Co. v. Clarkson, 7 Ind. 595.

² Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314; Wellersburgh, etc., R.R. Co. v. Young, 12 Md. 476. An agreement "to take the number of shares

set against our respective names," does not impose a personal liability on subscribers for the amount of their subscriptions in the absence of any promise to pay. Belfast, etc., R.R. Co. v. Moore, 60 Me. 561; Andover, etc., T. Co. v. Gould, 6 Mass. 180. Section 4 of the general railroad act of New York of 1850, providing that when articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not taken, open books of subscription to fill up the capital stock of the company, after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed; that at the time of subscribing every subscriber shall pay to the directors ten per cent. of the amount subscribed by him, in money, and no subscription shall be received without such payment; was not designed to prescribe a fixed statutory mode of making a subscription, but any contract of subscription good at common law, is valid. Buffalo & Jamestown R.R. Co. v. Gifford, 87 N.Y. 294. Where a corporation voted

When a certified copy of an order of a board of town trustees is entered on the book for the subscription for stock, and the subscription made in conformity with the copy of the order thus certified, the company has a right, in the absence of knowledge on its part of the fact that the agent so subscribing was exceeding his authority, to presume that such copy order of the board is correct.¹ The charter of a corporation provided that on each share subscribed the subscriber should pay the commissioners the sum of five dollars, and that in case of non-payment the subscription should be void. Before the company was organized the defendant signed a subscription paper, but did not pay anything, nor sign the subscription-book which was afterward opened. It was held that he was not a stockholder, nor liable, for the reason that he had not paid the earnest money, nor signed the book under the superintendence of the appointed commissioners. He could not be held on a promise to take stock, for the reason that the promise was not made to the company, which was not at the time in existence.² A company was organized under the general railroad law of Michigan with articles of association which fixed the amount of capital stock, and named five commissioners to open books for subscriptions to it. It was held that as the commissioners did not derive their powers from the corporation, but acted as a statutory board, a subscription to a paper circulated by an agent appointed by the directors of the company was not binding.³

at its first meeting the value of each share of its stock, and the defendant subscribed for stock the same day, and there appeared to be no other subscription paper, it was held to be a proper subscription. *Pacific R.R. Co. v. Renshaw*, 18 Mo. 210.

¹ *Shelbyville v. Shelbyville, etc., T. Co.*, 1 Metc. Ky. 54.

² *Charlotte, etc., R.R. Co. v. Blakely*,

3 Stroh. 245. See *Rikhoff v. Brown's Sewing Machine Co.*, 68 Ind. 388.

³ *Shurtz v. Schoolcraft, etc., R.R. Co.*, 9 Mich. 269. The book of minutes or original entries kept by commissioners appointed by the legislature for the organization of a corporation, is admissible in evidence in an action against a subscriber for stock. *Wood v. Coosa, etc., R.R. Co.*, 32 Ga. 273.

When the several subscribers sign separate instruments which are exact copies of each other, these papers are to be regarded as one and the same instrument.¹ A subscription paper, or one of several subscription papers, was held to be a book within the meaning of a statute requiring that subscription-books should be opened.² Where a subscription is made in a small blank book and afterward accepted by the corporation, it is not necessary to transfer it to the regular subscription-book.³ In an action by a railroad company to recover the amount of a subscription the defendant in his answer denied that he executed the instrument sued on. At the trial the book of subscriptions to the stock of the company, containing the names of the defendant and others, was admitted in evidence, the defendant objecting to it on the ground that proper proof of the loss of the original instrument had not been made. The evidence tended to show that the subscription of the defendant was made in the following way: A town meeting, which the defendant attended, was held in order to raise subscriptions to the stock of the railroad company. The objects of the subscription and the terms and conditions being made known to those present, the parties soliciting subscriptions were authorized by subscribers to write their names and the amounts of their subscriptions upon slips of paper, which were afterward transcribed by an officer of the company into the book offered in evidence. It was held that this book became the original contract or subscription and was properly received.⁴ Subscriptions to the stock of a corporation were made and signed upon a loose sheet of paper which was put in a bound book appropriated to the corporate records, and the con-

¹ Lake Ontario, etc., R.R. Co. v. Mason, 16 N. Y. 451.

² Hamilton, etc., P. R. Co. v. Rice, 7 Barb. 157.

³ Brownlee v. Ohio, etc., R.R. Co., 18 Ind. 68.

⁴ Iowa & Minnesota R.R. Co. v. Perkins, 28 Iowa, 281. See Stuart v. Valley R.R. Co., 32 Gratt. 146.

tents of the paper afterward entered in the book by the commissioners appointed to open books of subscription. It was held sufficient.¹ A. gave to an insurance company his bond by which he acknowledged the receipt from the company of ten shares of its capital stock, and agreed within a time named to pay to the company twenty per cent. of the value of such shares. The name of A. was entered on the corporate books, and publication made accordingly. It was held that A. was bound as a subscriber.²

The criterion of the liability of a subscriber to stock in a corporation is, whether any act has been done by which the corporation has been forced to receive the subscriber.³ Where the statute enacts that subscriptions to the capital stock shall be made in the manner to be provided by the by-laws of the corporation, a person who signs before by-laws are adopted is not a stockholder, nor liable under such subscription.⁴ A formal assignment of the stock by the corporation to a party is not necessary. It is sufficient that the corporation received and retained the amount paid by him toward the stock when he subscribed, and consented that he might act as a stockholder at the corporate meetings.⁵

¹ Woodruff v. McDonald, 33 Ark. 97.

² Hawley v. Upton, 102 U. S. 314. See McClelland v. Whiteley, 11 Biss. 444. The following is an incomplete agreement: "We, the undersigned, hereby subscribe for the amount of stock opposite our names, and agree to pay the same in four quarterly instalments, viz.: February 15th, April 15th, June 15th, and August 15th, for the purpose of forming a company to erect an Academy of Music." Hendrix v. Academy of Music, 73 Ga. 437.

³ Parker v. Northern Cent., etc., R.R. Co., 33 Mich. 23; Northern Cent. Mich. R.R. Co. v. Eslow, 40 Id. 222. See University of Des Moines v. Livingston, 57 Iowa, 307; Starrett v. Rockland Ins. Co., 65 Me. 374.

⁴ Carlisle v. Saginaw Valley, etc., R.R. Co., 27 Mich. 315. A subscriber who has acted as a stockholder, and as such accepted the office of director, to which he was appointed by the corporation, will be deemed to have waived all objection to the form of his subscription. Lane v. Brainerd, 30 Conn. 565.

⁵ Danbury, etc., R.R. Co. v. Wilson, 22 Conn. 435. A subscription delivered to one of the commissioners appointed to receive subscriptions, is not an *escrow*. To have made it such, it must have been placed in the hands of a disinterested third person. Wight v. Shelby R.R. Co., 16 B. Mon. 4. See Cass v. Pittsburg, etc., R.R. Co., 80 Pa. St. 31.

§ 177. Subscription previous to organization.—Signing articles of agreement to take shares of stock in a corporation to be organized does not constitute the subscriber a stockholder, and if he does not perform his part of the agreement by attending the meeting for organization, or paying his assessment, and the corporation has allotted his shares to another person, he cannot recover, even though his name was originally entered as a stockholder on the books of the company. From the time the corporation rescinded the contract, he was under no obligation to take and pay for the stock, and had no right to demand it.¹ The subscription to stock prior to the organization of the company, and stock acquired after the company is organized, do not stand on the same ground, and a rule applicable to the one does not necessarily govern the other.² The

¹ Perkins v. Union Button Hole Co., 12 Allen, 273. An agreement of several persons owning a business enterprise, and real estate connected with it, and who expect to be incorporated, that one of their number is entitled to a specified number of shares of the stock of the company, is not the agreement of the corporation thereafter created. Morrison v. Gold Mt., etc., Co., 52 Cal. 306; Hawkins v. Mansfield Gold Mining Co., Id. 513. So an agreement to subscribe for a certain amount of stock when the subscription-books are opened, does not make the signer a stockholder, and as such liable to calls. Thrasher v. Pike County R.R. Co., 25 Ill. 393; Stowe v. Flagg, 72 Id. 397. Where a subscription is made before the organization of the company there is no corporation to which the benefits of the subscription can inure until the subsequent steps are taken essential to bring the corporation into existence. In such case evidence of the parol admission by a subscriber of the existence of the corporation, will

not estop him to controvert the fact, nor can it supply the lack of proof that the statutory requirements have been complied with. Indianapolis, etc., Co. v. Herkimer, 46 Ind. 142; Reed v. Richmond Street R.R. Co., 50 Id. 342. But while a subscription is not valid and binding before the complete formation of the corporation, because there is then no party with whom a contract can be made, yet if after the corporation is formed it accepts the subscription, and the subscriber makes payments thereon, he becomes a stockholder in the company, liable to pay the full amount of his subscription. Buffalo & Jamestown R.R. Co. v. Gifford, 87 N. Y. 294; Buffalo & N. Y. City R.R. Co. v. Dudley, 14 Id. 336; Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, Ib. 65.

² Dayton, etc., R.R. Co. v. Hatch, 1 Disney, 84. The New York plank road act of 1847 provided that "when stock to at least the amount," etc., "shall be subscribed, then said subscribers may elect directors, and thereupon

signer of a subscription paper preliminary to the organization of the corporation, cannot, however, even before the organization is perfected, withdraw his subscription without the consent of the other subscribers, and though he has erased his name, the corporation can collect his subscription.¹ "The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propo-

they shall severally subscribe articles of association," etc., "and thereupon the persons who have so subscribed shall become stockholders in such company." It was held that signing the preliminary paper did not entitle the subscribers to be stockholders, nor impose on them a liability to take and pay for the shares. Poughkeepsie, etc., P. R. Co. v. Griffin, 24 N. Y. 150, reversing S. C. 21 Barb. 454. But by a signature to a paper purporting to be a subscription to stock in a corporate body, the subscriber is estopped from denying that the corporation is legally organized. Black River, etc., R.R. Co. v. Clarke, 25 N. Y. 208.

¹ Johnson v. Wabash, etc., P. R. Co., 16 Ind. 389. See Lake Ontario, etc., Co. v. Mason, 16 N. Y. 451. Although a subscription to preliminary articles of association which does not purport to be a contract with an existing corporate body does not estop the subscriber from afterward denying the existence of the corporation, yet an agreement in an action that fifty per cent. of the assessment to the capital stock has been paid in accordance with the by-laws and the laws of the State, involves an admission of the complete organization of the corporation. Rickoff v. Brown's, etc., Machine Co., 68 Ind. 368. The non-payment of ten per cent. required to be paid by a statute at the time of subscribing, does not render the subscription void; and if

the subscription is made before application for a charter, and the subscriber suffers his name to remain, the articles to be filed, and the organization to be completed, he is bound. Garrett v. Dillsburg, etc., R.R. Co., 78 Pa. St. 465. The charter of a railroad company provided that when \$100,000 had been subscribed, and "one dollar on each share paid, the company might organize and proceed to work." It was held that this did not require that the one dollar on each share should be first paid by the subscriber, and that even if it did, the organization of the company without that was a mere irregularity which could not be attacked in a collateral proceeding to enforce the payment of a subscription. South Carolina, etc., R.R. Co. v. Ezell, 14 S. C. 281. It was held in Indiana not to be a defense to an action on a subscription to the stock of a railroad company, that at the time of subscribing there was no corporation in existence; because the defendant is estopped by his contract to deny the corporation; and because, under the general railroad law of the State, subscriptions are required for the organization of the proposed corporation, and are therefore valid before the corporation is organized, and may be collected by it after organization. Anderson v. New Castle, etc., R.R. Co., 12 Ind. 376.

sitions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case ; to wit, as a contract with the common representative of the several associates.”¹ Under the general railroad law of New York of 1850, a person who has merely signed articles of association before the corporation comes into being, is not a member of the company, unless the articles so subscribed by him have been filed as required by the statute. By omitting to file articles subscribed by a party, the corporation has rejected him as a proposed member, and has no claims upon him.² But the fact that the statute expressly requires that a certain amount of stock shall be subscribed before the association proceeds to organize, is sufficient answer to the objection that the subscription was made before the company was legally capable of making a valid contract.³

A subscription to articles of association being in effect a contract to pay for and accept the shares of stock sub-

¹ Athol Music Hall v. Carey, 116 Mass. 471, per WELLS, J. In this case, the paper signed was as follows : “We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, and pay to the treasurer of said corporation the amounts of the several shares set against our respective names.” It was held, that though the promise was originally voluntary or in the nature of an open proposition, yet, as an act of incorporation was afterward passed before a subscriber attempted to withdraw it, he had lost the right to do so, and it was binding upon the corporation as well as upon him. See Buffalo, etc., R.R. Co. v. Clark, 22 Hun, 359; Lake Ontario Shore R.R. Co. v. Curtiss, 80 N. Y. 219; Quick v. Lemon, 105 Ill. 578; Red Wing Hotel Co. v. Friedrich, 26 Minn. 112; Boot

& Shoe Co. v. Hoit, 56 N. H. 548; Mt. Sterling Coal R.R. Co. v. Little, 14 Bush. Ky. 429; Twin Creek, etc., Turnp. Co. v. Lancaster, 79 Ky. 552; McClure v. People’s Freight R.R. Co., 90 Pa. St. 269.

² Erie, etc., R.R. Co. v. Owen, 32 Barb. 616; Burt v. Farrar, 24 Id. 518. Where the charter provides that “upon subscription for shares in said stock, the subscribers shall pay the sum of five dollars upon each share subscribed,” but it does not say that in default of payment subscriptions shall be void, such payment is not a condition precedent to the organization of the company. Mitchell v. Rome R.R. Co., 17 Ga. 574.

³ Rensselaer, etc., Co. v. Barton, 16 N. Y. 457 note. See Home Stock Ins. Co. v. Sherwood, 72 Mo. 461.

scribed, it is not open to revocation. "Until the incorporation of the company was perfected, the other subscribers had an interest in its execution and performance of which they could not be deprived by the act of the defendant; and after the articles were filed and recorded in the secretary's office, and the corporation had a legal existence, it acquired a vested interest in the defendant's agreement."¹

§ 178. Consideration for subscription.—The rights and immunities which attach to a subscriber constitute a sufficient consideration to impose upon him a legal obligation to pay according to the terms of the subscription.² When commissioners appointed to receive subscriptions and distribute stock, place on the books of the corporation, in the name of a subscriber, a statement of the stock for which he has subscribed, such subscriber thereby receives the consideration for his bond and mortgage given to secure the

¹ Lake Ontario, etc., R.R. Co. v. Mason, 16 N. Y. 451, per BROWN, J. See Inter-Nat. Publishing Co. v. Jack, 5 Montana, 568. Where a general railroad act provides that articles of association shall not be filed with the secretary of state until at least one thousand dollars worth of stock for every mile of the road proposed to be made is subscribed and ten per cent. paid thereon, it is not to be construed to mean ten per cent. on each separate share subscribed, but ten per cent. upon such a sum of subscriptions as in the aggregate will constitute a total subscription of the amount required. *Lake Ontario, etc., R.R. Co. v. Mason, supra.*

² Instone v. Frankfort Bridge Co., 2 Bibb. 576; East Tenn., etc., R.R. Co. v. Gammon, 5 Snead, 567; Meads v. Walker, Hopkins Ch. 587; Harlem Canal Co. v. Seixas, 2 Hall N. Y. 504; St. Paul, etc., R.R. Co. v. Robbins, 23 Minn. 439; Bish v. Bradford, 17 Ind. 490; Stokes v. Lebanon, etc., Turnp.

Co., 6 Humph. Tenn. 241; Kennebec, etc., R.R. Co. v. Jarvis, 34 Me. 360; Osborn v. Crosby, 63 N. H. 583; Thigpen v. Miss. Cent. R.R. Co., 32 Miss. 347; Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314; Twin Creek, etc., Co. v. Lancaster, 79 Ky. 552; McCally v. Pittsburgh, etc., R.R. Co., 32 Pa. St. 25; Upton v. Tribilcock, 91 U. S. 45. Persons invest their money in corporate stock because they are not personally liable (unless declared to be so by the charter) for any debt or obligation of the corporation, so that all the stockholder can lose is the sum he voluntarily invests. The stockholder is also protected by the fact that the charter limits the business to be transacted in kind and extent, and does not permit a majority of members, officers, or directors to exceed the power given by the statute, or to bind the capital by acts beyond those expressly allowed. *People v. Parker Vein Coal Co., 10 How. Pr. 543.*

payment of his subscription, and a subsequent refusal of the corporation to permit a transfer of the stock, and to issue scrip for it, would not rescind the contract.¹ As between the several subscribers, the consideration is the mutual promises to contribute toward a fund to be raised for a specified object in which all are alike interested.² Where by the terms of the charter each subscriber becomes a stockholder, and a member of the company, the interest thereby acquired is a sufficient consideration to support an action for the amount subscribed upon an express promise.³ The delivery of a promissory note to the payee as a subscription to the endowment fund of a seminary, is in law absolute, though the intention may have been that the note was to be held in trust until the endowment fund was fully subscribed, and parol evidence cannot be admitted to vary the legal effect of such delivery.⁴ A person who accepts

¹ Thorp v. Woodhull, 1 Sandf. Ch. 411. The treasurer of a company about to form a corporation may receive from the subscribers payment of the per cent. required by law to be paid as earnest money, in bank checks payable *in presenti*, provided they are drawn in good faith against a sufficient fund, and will be paid on presentation. People v. Stockton, etc., R.R. Co., 45 Cal. 306. An occasional check taken by the commissioners in good faith as the cash payment of a subscriber, would not invalidate the subscription on the plea of the subscriber, though the check were not good. Thorp v. Woodhull, *supra*.

² Hamilton, etc., P. R. Co. v. Rice, 7 Barb. 757; Stewart v. Trustees of Hamilton College, 2 Denio, 403. A subscription made in contemplation of a charter to accomplish any legitimate object, is a valid contract between the parties, and as such may be enforced. The mutual promise is a good consideration on which to found a contract.

Tonica, etc., R.R. Co. v. McNeely, 21 Ill. 71.

³ Vermont Cent. R.R. Co. v. Clayes, 21 Vt. 30; Dutchess C. M. Co. v. Davis, 14 Johns. 238; Balt., etc., T. Co. v. Barnes, 6 Har. & Johns. 57. Where a party verbally promised a canvasser for subscriptions to the stock of a corporation to take shares, and gave her promissory note and a mortgage to secure payment of the same, it was held that in the absence of proof that she had secured the stock, there was no consideration. Fanning v. Ins. Co., 37 Ohio St. 339; 41 Am. R. 517.

⁴ Roche v. Roanoke Seminary, 56 Ind. 198. When the statute authorizes a corporation to accept donations and contributions, a note subscribed to an endowment fund requires no consideration to support it other than the accomplishment of the object in aid of which the money was promised. Ibid. See First Nat. Bank v. Hurford, 29 Iowa, 579. G. gave to a railroad company his promissory note to aid it in

subscriptions to the funds of a literary institution, thereby agrees that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscriptions, and thus mutual and independent promises are made which constitute a legal and sufficient consideration.¹ When a subscription is conditional, performance of the condition constitutes a consideration for the promise to pay.² Where a subscriber told those in charge of the erection of a church edifice to go on and finish it, and he would pay his subscription, it was held a waiver of the conditions of the original subscription, and that the fact that the society incurred expense on the faith of this, and similar promises from others, was a sufficient consideration.³

A condition in a subscription paper limiting the liability of the subscriber to pay anything unless a sum certain is subscribed, is not a request to the corporation for whose benefit the sums are subscribed, that it shall procure subscriptions to that amount, and there is no undertaking on the part of the corporation that it will endeavor to do so.⁴ Merely signing an offer or request to become a stockholder in a corporation, not assented to or accepted by the corpo-

the construction of its road, the consideration being stock in the company. At the time it was understood that the note, with others of like purport, if a sufficient number of them were obtained, were to be turned over to another company which was to construct the road. This not being accomplished, the road was built by the plaintiff, who was the assignee of the payee of the note. It was held that upon compliance with the other conditions of the note, it was collectible by the plaintiff. *Merrill v. Gamble*, 46 Iowa, 615; *Same v. Beaver*, Ib. 646. An answer in a suit on promissory notes, given in payment of a subscription for stock, denying that the plaintiff corpo-

ration has given the defendant his stock, is bad, the corporation being only bound to conditionally tender the stock. *Hardy v. Merriweather*, 14 Ind. 203.

¹ *Ladies' Collegiate Institute v. French*, 16 Gray, 196.

² *Spartanburg, etc., R.R. Co. v. De Graffenreid*, 12 Rich. 675; *Mansfield, etc., R.R. Co. v. Stout*, 26 Ohio St. 241; *Chamberlain's Case*, 15 Id. 225; *Ashatabula, etc., R.R. Co. v. Smith*, Ib. 328; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Allman v. Havana, etc., R.R. Co.*, 88 Ill. 521.

³ *Reformed, etc., Church v. Brown*, 17 How. Pr. 287.

⁴ *Trustees of H. College v. Stewart*, 1 Comst. 581.

ration, does not make a person such.¹ In an action by a corporation against subscribers to an agreement "to take and pay for our proportion of the number of shares affixed to our respective names," the plaintiff will be nonsuited, unless it proves that by its duly authorized agent it ratified the subscription. The making out of certificates of ownership to the subscribers by the treasurer of the corporation will be of no avail unless there is evidence that he had authority for that purpose.² Subscribers are only bound when the corporation is bound; and where the statute creates no obligation on the part of the corporation except upon subscriptions regularly made, no others can be enforced unless they are made upon some actual consideration or binding agreement.³ The law in force when a proposal for a contract of subscription is made, forms a part of it, and if such proposal be not accepted until the law is essentially changed, such acceptance comes too late, and the proposal falls with the repeal of the law which induced it.⁴

¹ Sewall v. Eastern R.R. Co., 9 Cush. 51. A clergyman solicited subscriptions during a religious service to aid in finishing the church building and in paying the indebtedness already incurred. The defendant said, addressing the minister: "Put me down for a hundred dollars," or words to that effect. It was held a mere offer, which the defendant might retract, until accepted by the society by a vote, or through an agent authorized by vote. Meth. E. Church v. Sherman, 36 Wis. 404.

² Essex T. Co. v. Collins, 8 Mass. 292. Where the law requires a certificate of organization to be signed by the stockholders, until this is done the association has no legal existence, and a bond and mortgage executed and delivered previous thereto to the "president," etc., to secure payment for stock, is in effect payable to a fictitious per-

son and without consideration. Valk v. Crandall, 1 Sandf. Ch. 179.

³ Parker v. Northern, etc., R.R. Co., 33 Mich. 23. A. subscribed toward the construction of a contemplated railroad, the company agreeing to deposit collaterals to secure the subscriptions. After A. had made some payments on his subscription, the company put the collaterals beyond the control of the subscribers. It was held that A. was released from his obligation. Reusens v. Mexican Nat. Construction Co., 22 Fed. Rep. 522.

⁴ Mercer County v. Pittsburg, etc., R.R. Co., 27 Pa. St. 389; Pittsburg, etc., R.R. Co. v. Stewart, 41 Id. 54; Caley v. Philadelphia, etc., R.R. Co., 80 Id. 363; Hanover Junction, etc., R.R. Co. v. Haldeman, 82 Id. 36; Union Hotel Co. v. Hersee, 79 N. Y. 454; Lake Ontario R.R. Co. v. Curtiss, 80

§ 179. **Nature of conditional subscription.**—After the approval of an act by which a company is incorporated and under which it is organized, it is an existing corporate body clothed with power to receive conditional subscriptions, on which it will not be in a situation to demand payment until the conditions have been fulfilled. The subscriber may, by his acts or otherwise, waive the performance of the condition; but it is incumbent on the corporation to show either a waiver or a performance of the condition before it can recover on the subscription. A conditional subscription is a continuing proposition, which, upon compliance with the condition becomes an absolute subscription;¹ but before the condition is fulfilled, the subscriber is not a stockholder nor liable on his subscription.² Where the condition was that a specified sum should be subscribed before a given date, the court said: “Whatever might be the condition of the stock-book subsequent to June 14, 1867, at that time the conditions upon which the defendants subscribed had not been fulfilled, their proposition to take stock had not been accepted, and they were released from any obligation which before that might have rested

Id. 219; *Ellison v. Mobile, etc., R.R. Co.*, 36 Miss. 572; *Putnam v. New Albany*, 4 Biss. 365; *Burke v. Smith*, 16 Wall. 390. See *Bedford R.R. Co. v. Bowser*, 48 Pa. St. 29; *Boyd v. Peach Bottom R.R. Co.*, 90 *Id.* 169. An act of incorporation which provides that the directors shall not sell and dispose of stock under its par value, does not forbid them from taking conditional subscriptions. *McMillan v. Maysville, etc., R.R. Co.*, 15 B. Mon. 218. But the president of a corporation has no power to consent that a subscription absolute in its terms shall become conditional. *Morgan County v. Thomas*, 76 Ill. 120. When a party enters into a contract in writing to take shares of

stock in a railroad company, it is not competent for him to prove by parol that his subscription was on a condition. *Wight v. Shelby R.R. Co.*, 16 B. Mon. 4; *North Carolina R.R. Co. v. Leach*, 4 Jones N. C. 340; *Kennebec R.R. Co. v. Waters*, 34 Me. 369.

¹ *Ashtabula, etc., R.R. Co. v. Smith*, 15 Ohio St. 328.

² *Evansville, etc., R.R. Co. v. Shearer*, 10 Ind. 244; *Monadnock R.R. v. Felt*, 52 N. H. 379; *Chase v. Sycamore, etc., R.R. Co.*, 38 Ill. 218; *Garrett v. Dillsburg, etc., R.R. Co.*, 78 Pa. St. 465; *Cole v. Joliet Opera-House Co.*, 79 Ill. 96; *Santa Cruz R.R. Co. v. Schwartz*, 53 Cal. 106.

upon them. After such release, their obligation could not be restored by any act of the other parties to the contract without their consent."¹ A subscription to the capital stock of a railroad company, on the condition stated therein that the road is located within a certain distance of a specified place, is a condition precedent. The giving of unconditional notes for such a subscription, unless so intended by the parties, does not waive the condition; and a failure to perform it may be pleaded by the maker in bar of a recovery on the notes.² Where the agent of a corporation, by whom a conditional subscription is procured, agrees to hold back the subscription until the subscriber

¹ Ticonic Water Power Co. v. Lang, 63 Me. 480. See Penobscot, etc., R.R. Co. v. Dunn, 39 Id. 589; Penobscot R.R. Co. v. White, 41 Id. 512. When the charter requires that a certain amount of stock shall be subscribed before the corporation goes into operation, this is a condition precedent, the fulfilment of which must be averred in the pleadings before the corporation can recover in an action to enforce the payment of a subscription. Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314. By the act incorporating a religious society, it was authorized not only to build a meeting-house, but to hold other property, the yearly income of which should not exceed \$1,500. A by-law was passed at a meeting duly warned, held for the purpose of accepting the charter and organizing under it, providing that each share of capital stock should be \$25, and if any subscriber should elect to pay into the treasury in addition to this sum the further sum of \$3, he should be entitled to receive a certificate not transferable, but redeemable out of the corporate fund whenever he should take up a permanent residence elsewhere. It was held, in an action against the corporation by a person

who had subscribed for four shares and paid \$112 to recover \$100, that the by-law and the plaintiff's subscription constituted a contract, and that the plaintiff was entitled to recover. Davis v. Proprietors of Meeting-House in Lowell, 8 Metc. 321. In an action by a railroad company to recover the amount of a subscription to its capital stock with interest, the defendant admitted the subscription, but alleged in his answer that the agents of the company, who had obtained the subscription, agreed that he should be allowed in discharge of the same any damage he might sustain by the reason of the running of the railroad through his land, and that the road had been constructed through his farm, greatly injuring him. It was held that the answer presented a valid counter-claim. Louisville, etc., R.R. Co. v. Thompson, 18 B. Mon. 735.

² Parker v. Thomas, 19 Ind. 213; Taylor v. Fletcher, 15 Ind. 80. A conditional subscription which is contrary to public policy is void. See Butter-nuts, etc., Turnpike Co. v. North, 1 Hill, 518; Fort Edward, etc., P. R. Co. v. North, 15 N. Y. 583.

authorizes him to deliver it to the corporation, it is held as an escrow, and if revocable by one, it must also be so by the other.¹

§ 180. Construction of conditional subscription.—A question not infrequently arises as to the meaning and extent of a condition as derived from the language employed. On a subscription to the stock of a railroad company to be paid “in such instalments and at such times and places as may be required by the board of directors,” upon condition that “said road shall be so located and constructed as to make the town of C. a point in said road, otherwise to be void,” it was held that the place, and not the amount of work done, was referred to.² A subscription was on the condition that the road should be located “within one mile,” etc., and notes were given for the nominal amount of the stock, which notes were not paid at maturity. Performance of the condition was not intended to precede payment of the notes, because the professed object in obtaining them was to enable the company to proceed with the work. It was held that a subscriber who had failed to pay his notes as they matured, could not be allowed to set up the failure of the company to perform, but that if it had located its road upon any other route, or had otherwise rendered itself incapable of complying with its contract, the case might have been different.³ Where a subscription to the stock of a railroad company was made payable at such times and in such instalments as the directors might prescribe, provided the road was permanently located, and that a freight-house and depot should be built at a point designated, it was held that the erection of the buildings was not a condition precedent to the pay-

¹ Cass v. Pittsburg, etc., R.R. Co.,
80 Pa. St. 31.

² McMillan v. Maysville, etc., R.R. Co., 15 B. Mon. 218.

³ Keller v. Johnson, 11 Ind. 337.
See Racine County Bank v. Ayres, 12 Wis. 512.

ment of the amount subscribed.¹ It was stipulated in a promissory note given on a subscription to the stock of a railroad company, that if the road was not completed in a given time, and the cars then running to a place named,

¹ Chamberlain v. Painesville & Hudson R.R. Co., 15 Ohio St. 225. In this case, the court said: "A strictly literal performance of the proviso, assuming all therein stipulated to be conditions precedent, would require only the permanent location of the road—not its construction—and the erection of the freight-houses and depot. But the building of the latter would be useless without the completion of the former; and if for any cause the road should fail to be made, or the work should be suspended in course of construction, it would be for the interest of all concerned that no money should have been expended on the buildings. But a literal construction would be unreasonable and manifestly against the intention. It must be presumed to have been contemplated by the parties that the road and buildings necessary to its operation for business when completed would be constructed in the usual way. That the plaintiff undertook to build the freight-house and depot is clear. The question is, was the performance of the undertaking a condition precedent, or was it not rather a stipulation, which the company undertook to perform at the appropriate time? It may be said that the road was to be completed as well as the buildings before the subscription would become binding. But it is not so written. All that is required to be done in regard to the road is that it be permanently located so as to make the points named. The freight-house and depot only are required to be built. There is no more reason for requiring the plaintiff to do more than permanently locate its road, thus adding to the language of the pro-

viso, than there would be to lessen the expressed obligation in regard to the buildings. If the party intended that the building of both should concur before his rights and liability as a stockholder should attach, it seems to us he would have applied the same or similar language to both. It would be a greater departure from the letter to add to the sense of the words 'permanently located' and require the road to be completed, than to give to the depot clause the effect of a stipulation or condition subsequent, which would simply postpone the time of its performance. In the meantime the road would be in process of construction on the line desired by the defendant; and, to the extent of his subscription, like other stockholders, he would contribute to the work and have the right in common with them to exercise a corresponding influence in the affairs of the corporation. The express stipulation that the amount of the subscription is to be paid at times and in instalments upon the requisitions of the directors, like ordinary stock subscriptions, favors this construction. . . . If it had been the design of this subscriber by special terms to entirely exempt himself from all interest and liability until the work should be completed, and thus make everything which the company was to perform a condition precedent, it is hardly reasonable to suppose that with such a purpose in view he would have further stipulated for payment by future calls, the making of which necessarily involved the exercise by the directors of a discretion dependent upon the necessities and financial condition of the

the note should be null and void. It appeared that cars were run at the time designated over a temporary track laid down for the purpose, but that it was four months afterward before they were running to the point specified. It was held that although it was not necessary for the fulfilment of the condition, that the road should be perfect and finished in every particular, yet that it was not completed within the meaning of the note, which was therefore void.¹ The defendant signed a subscription paper headed : "We, the undersigned, agree to pay the sums set against our respective names, for the establishment and support of a new ferry from E. B. to B. . . . provided sufficient is subscribed for the purpose; the same to be represented by the certificates of stock to be created by the company hereafter to be organized. Jan. 1st, 1853." The company was incorporated the 25th of May, 1853, and the defendant signed the paper in June, 1854. Before he did this, the company had entered into contracts to the amount of \$265,200. The nominal amount of subscriptions was \$153,000, besides verbal agreements to take \$22,000 more of stock. It was held that the company

company. . . . The end sought was the completion of the proposed railroad with the depot and buildings necessary to its operation. The object of the defendant was to secure it with a freight-house and one of its depots at the point named in his subscription. After the location of the road, which would require comparatively but a small expenditure, the first, and known to all as an indispensable requisite to the successful prosecution of the work, was a sufficient amount of available stock subscriptions. The capital of the plaintiff consisted of its stock; but it could not employ contractors, purchase materials and rights of way—in short, build a railroad upon the credit of its untaken stock. What its situa-

tion required was, not subscribers who would agree to take stock when the road should be finished, but present subscriptions, which alone would furnish the means and credit that would enable it to construct its road. . . . We are of opinion, therefore, that when the railroad company accepted the subscription and permanently located its road in accordance with its terms, it took immediate and full effect as a stock subscription, and that the provision in relation to building the freight-house and depot remained as an executory contract to be performed by the company."

¹ Freeman v. Matlock, 67 Ind. 99. See Burlington, etc., R.R. Co. v. Boestler, 15 Iowa, 555.

could not sue on the contract as of date June, 1854, because the contract was to pay a company "to be hereafter organized," and at that date the company was organized; nor as of date Jan. 1st, 1853, because the paper then contemplated the future organization of a company. The conditional liability of the defendant was construed by the court to mean, a sufficient sum as estimated by persons of competent skill and judgment, and not the actual cost. "It must," said the court, "be such a sum as, according to a fair estimate, . . . would leave them owners of the property, and free from debt contracted on account of necessary original outlays."¹

A provision in the statute that an instalment of five dollars on each share of stock shall be payable at the time of making the subscription, does not apply until after the legal relation of a stock subscriber has been established by the subscription becoming absolute.²

§ 181. Performance of condition.—Since the party subscribing upon a condition is not obliged to pay for the shares agreed to be taken by him before the condition is performed, in an action for payment the fulfilment of the condition must be alleged and proved.³ In the performance of a condition that the subscription shall be binding only in the event that a certain amount of stock is subscribed, a corporation may accept in payment for the stock which goes to make up the stipulated amount, labor, materials, or

¹ People's Ferry Co. v. Balch, 8 Gray, 303. See Belfast, etc., R.R. Co. v. Cottrell, 66 Me. 185.

² Ashtabula, etc., R.R. Co. v. Smith, 15 Ohio St. 328.

³ Chase v. Sycamore, etc., R.R. Co., 38 Ill. 215; Fort Edward, etc., P. R. Co. v. Payne, 17 Barb. 567; Swartwout v. Michigan Air Line R.R. Co., 24 Mich. 389; Union Hotel Co. v. Hersee, 15 Hun, 371. One of the provisions of

a general act regulating railroad companies was that no subscription should be valid unless the party making it at the time of subscribing, paid the commissioners five dollars on each and every share for the use of the company. It was held that giving a note for the amount was not payment within the meaning of the law. Boyd v. Peach Bottom R.R. Co., 90 Pa. St. 169. See Syracuse, etc., R.R. Co. v. Gere, 4 Hun, 392.

damages which the company is liable to pay, or any other corporate liability, provided the transaction is entered into and carried out in good faith.¹ It has been held that where a subscription to stock is upon the condition that it shall be payable after a specified amount has been subscribed, it is competent, in determining whether this has been done, to include an unconditional subscription by a municipal corporation, although the payment of it is in bonds of the city at par when their market value is less than par; also stock subscribed by contractors, payable in whole or in part by labor and materials estimated at their cash value to the corporation; also a subscription for one-half of which the corporation has the option to give its bonds instead of stock. But unpaid subscriptions which cannot be enforced, are to be excluded.² A subscription to railroad stock was "on condition that in the judgment of the board of directors, a sufficient amount is subscribed to grade," etc. It was held that if the directors passed a resolution to that effect in good faith, the condition precedent was fulfilled.³ One of the stipulations in a subscription paper for stock was, that certain persons named should be appointed a committee to see that the stipulations were faithfully complied with before the subscriptions were paid to certain builders. It was held that the appointment of the committee fulfilled the condition; what the action of the committee should be, not being a condition precedent.⁴ Defendants undertook to secure subscriptions for a railroad company in notes, "provided the company ran its track through P. as already surveyed." The subscriptions were

¹ Phila., etc., R.R. Co. v. Hickman, 28 Pa. St. 318.

² Phillips v. Covington, etc., Bridge Co., 2 Metc. Ky. 219; Oskaloosa Agr. Works v. Parkhurst, 54 Iowa, 357. Where a subscription is upon the condition that one hundred subscribers are secured, it is not sufficient that the

number of names specified appear, but it must be shown that the signatures are genuine. Rockford v. Shunick, 65 Ill. 223.

³ Cass v. Pittsburg, etc., R.R. Co., 80 Pa. St. 31.

⁴ Shaffner v. Jeffries, 18 Mo. 512.

obtained, but the notes named as a condition that they should be void if trains were not running on or before a certain date. It was held that the company was entitled to a discovery of subscriptions made, and to a surrender of the same, or of any money received thereon, though the trains were not running on or before the date specified in the notes, the latter condition not being in the obligation of the company.¹ A condition that a railroad shall be put under contract for grading to a point named in the subscription paper, is not binding if the contract for grading is to a different point.² A subscription to the stock of a railroad company on condition that the company will locate and construct its road on a certain route, does not require the completion of the road before payment can be demanded.³ A condition precedent to the payment of a bond for a subscription to a railroad company that the road "shall be completed" to a point named, is complied with if it is shown that the road is finished so as to authorize the company to carry freight and passengers and to demand and receive pay therefor, although some portion of the work is intended to be replaced with other and better materials; the word "completed" being understood in its

¹ Des Moines Valley R.R. Co. v. Graff, 27 Iowa, 99.

² Conn., etc., R.R. Co. v. Baxter, 32 Vt. 805. When a subscription is upon the condition that the sum subscribed shall be expended on a specified portion of the work, it is not necessary for the corporation to set apart those specific funds for the performance of the condition. It is sufficient that an equal amount is expended in the way required. Nichols v. Burlington R.R. Co., 4 Greene, Iowa, 42. In such case, a general creditor cannot, by trustee process, divert and hold the money for a debt not incurred for the purpose

designated. Pike v. Bangor, etc., R.R. Co., 68 Me. 445.

³ Miller v. Pittsburg, etc., R.R. Co., 40 Pa. St. 237. A condition precedent that "the line of the railroad shall be located and built within one mile of the post-office," is complied with when the road is permanently located on the line specified. Swartwout v. Mich. Air Line R.R. Co., 24 Mich. 389. A subscription to a railroad company, provided the road is permanently located on a certain route named, is binding when the road is so located, and before its construction. Chamberlain v. Painesville, etc., R.R. Co., 15 Ohio St. 225.

plain common-sense meaning, and not in its full and critical signification.¹

Where a corporation decides by vote to issue a specified number of additional shares of stock, this is not a stipulation or agreement amounting to a condition upon which it disposes of the shares, and a person who takes one or more of the shares and gives his note in part payment, is not released from his obligation to pay it because the entire number of shares specified have not been sold.² In the absence of misrepresentation or fraud, a stockholder cannot maintain an action against the corporation to recover back the amount paid by him on his subscription, on the ground of the failure of the corporation to acquire all the land mentioned in its prospectus.³

§ 182. Waiver of condition.—Although where the capital, number of shares, and amount to be paid for each share, are fixed by the charter, an action will not lie to enforce the payment of a subscription until the whole capital is taken, because it will be presumed that the entire amount of the capital will be required for the successful prosecution of the business of the corporation, and that the subscription was made upon this implied understanding, yet when it is obvious from the language and import of the charter that the whole capital stock is not essential to the organization of the corporation, and that the subscriber knew or had reason to know this at the time of his subscription, he may waive the taking of the whole number of shares as a preliminary condition, and be estopped by his conduct from relying on it as a defense.⁴ If a subscription paper

¹ O'Neal v. King, 3 Jones N. C. 517. See Moore v. Hanover Junction R.R. Co., 94 Pa. St. 324; Caley v. Phila. & Chester County R.R. Co., 80 Id. 363.

² Nutter v. Lexington, etc., R.R. Co., 6 Gray, 85; Clarke v. Thomas, 34 Ohio St. 46.

³ Kelsey v. Northern Light Oil Co., 54 Barb. 111, MULLIN, J., dissenting. ⁴ Morrison v. Dorsey, 48 Md. 463; Hagar v. Cleaveland, 36 Id. 460; Musgrave v. Morrison, 54 Id. 161; Ossipee Manf. Co. v. Canney, 54 N. H. 295. A shareholder who assists in the organiza-

contains a clause, "These subscriptions are made upon the express condition that they shall not be binding until the aggregate sum" (less than the entire stock) "in *bona fide* subscriptions shall have been made," the subscriber thereby waives the implied agreement, and gives the company the right to call in the subscriptions made at any time when the agreed number of shares, less than the whole, shall have been taken.¹ Paying the first instalment, voting at an election for officers, and acting as an officer of the corporation, is a waiver of a condition that a specified amount shall be subscribed.² So, the giving of a promissory note in payment of one or more instalments, and taking a receipt from the corporation stating the object of the note, and that when it is paid, it is to apply on the maker's stock, is a waiver of a conditional subscription.³ Defendant subscribed toward raising a fund for the erection and establishment of an academy, payment not to be made unless the sum subscribed amounted to \$2,500. He drew the subscription paper and solicited subscriptions; was one of the trustees named therein; attended the trustee meetings, and took an active part in them, until \$2,500 were nearly subscribed. As a member of the building committee he joined in a contract for the purchase of the lot, and the deed was

ation of the corporation cannot escape from his liability to pay for his stock on the ground that the organization was not in strict conformity with the law. Center, etc., T. Co. v. McConaby, 16 Serg. & Rawle, 140; Selma, etc., R.R. Co. v. Tipton, 5 Ala. 787; Centr. P. R. Co. v. Clemens, 16 Mo. 359.

¹ Emmitt v. Springfield, etc., R.R. Co., 31 Ohio St. 23. Where a party subscribed to stock upon other conditions than those named in the articles of incorporation and subsequently paid five per cent., which was accepted by the corporation, it was held that this showed concurrence in the new

conditions and created a mutuality. Nichols v. Burlington, etc., P. R. Co., 4 Greene, Iowa, 42.

² Dayton, etc., R.R. Co. v. Hatch, 1 Disney, 84. A subscriber to stock in a corporation, who, as an officer, participates in calling a meeting for its permanent organization, is therein chosen a director, and acts as such, thereby waives his right to avoid payment on the ground of insufficiency of the notice of the call for the meeting. Bucksport, etc., R.R. Co. v. Buck, 68 Me. 81.

³ Chamberlain v. Painesville, etc., R.R. Co., 15 Ohio St. 225.

made out to him and his associates. During this time some expenses were incurred, such as clearing off the lot, digging a well, etc. He then served on the building committee, on the trustees, and on some others, a notice that he had erased his name from the subscription paper. This erasing was done without the consent of the others, though his co-trustees consented to his resigning as trustee. At the time of the service of this notice, the amount of the subscriptions was \$2,450, and it eventually was \$4,000. It was held that as the defendant united with his associates in incurring liabilities, knowing that the \$2,500 had not been fully subscribed, he waived the condition, and was estopped from asserting a non-compliance with its terms, and that he was consequently liable to pay the amount of his subscription.¹ A subscriber to the stock of a railroad company was one of the commissioners designated by an act of the legislature to receive subscriptions, preparatory to the incorporation and organization of the company. Attached to his subscription was a proviso that no subscription should become due until the sum of \$200,000 was subscribed, and the road went within half a mile of a place named. Afterward he united with the other commissioners in certifying to the governor of the State that above ten per cent. of the capital stock of the company had been subscribed; that he had subscribed for twenty shares; and that the subscriptions certified (of which his was one) were in all respects made and taken in good faith and agreeably to the requirements of the law. A charter was accordingly granted. It was held that the certificate was a waiver of the condition.² Under a charter authorizing a capital of two millions of

¹ Hutchins v. Smith, 46 Barb. 235; Cowles v. Cromwell, 25 Id. 413. Where a subscriber permits work to be carried on for a length of time without objection, he will be regarded in equity as acquiescing in the acts done, and will not be relieved from payment of his subscription on the ground that the plan has been changed. Booker, *ex parte*, 18 Ark. 338.

² Bavington v. Pittsburg, etc., R.R. Co., 34 Pa. St. 358.

dollars, the corporation was organized with a capital of \$350,000, the shares being \$1,000 each. The defendant subscribed for five shares of stock, by signing a paper which stated that the corporation was to have a capital of not less than one and a half millions of dollars. He transferred four of his shares, and paid one instalment on his other share. He then made a transfer of this remaining share, which the company refusing to assent to, no transfer was made on the books. Refusing to pay subsequent assessments, this action was brought. It was held that the taking shares in another and smaller capital was not a waiver of the condition on which the promise to pay for shares in a larger stock was made; but that as the defendant took part in the meeting at which the capital of the company was decided on, and paid an assessment on one share of stock, he was liable.¹ A condition precedent in a subscription of land to a railroad company is waived when the subscriber, before any act of the corporation indicative of an intention to comply with the condition, executes his deed absolute, and receives the stock.²

§ 183. Subscription on special terms of payment.—When the capital stock and number of shares are fixed by the act of incorporation, or by vote or by-law, no assessment can be lawfully made on the share of a subscriber until the whole number of shares has been taken. “When a man subscribes for a share of stock to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that

¹ Atlantic Cotton Mills v. Abbott, 9 *Cush.* 433.

² Parks v. Evansville, etc., R.R. Co., 23 Ind. 567. See Jewett v. Lawrenceburg, etc., R.R. Co., 10 Ind. 539; Evansville, etc., R.R. Co. v. Dunn, 17

Id. 603. A penalty in the terms of the subscription is either surplusage, or merely cumulative, which may be waived by the corporation. Kirksey v. Florida, etc., P. R. Co., 7 Fla. 23, BALTZELL, J., dissenting.

the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced toward it."¹ Where the act creating a corporation provided that the capital stock should be divided into five thousand shares, not exceeding \$100 each, and that after one thousand shares had been subscribed, a meeting of the subscribers might be called for the purpose of organizing the corporation, and arranging its affairs, it was held that no legal assessment could be made for the general objects of the corporation until five thousand shares had been subscribed; but that an assessment to pay preliminary expenses was valid, and subscribers personally liable therefor.² A charter provided that no subscription should be received unless there was paid to the commissioners, at the time of the subscription, the sum of five dollars on each share subscribed. A subscriber not having paid the five dollars a share at the time of subscribing, an action was afterward brought by the corporation against him to recover the amount of instalments due. It was held that the subscription was void, notwithstanding the subscriber had promised to pay the instalments, and had attended and voted at the corporate meetings.³ A subscription to stock made and accepted on the condition that not more than ten per cent. shall be required to be paid at any one call, and that calls shall not be made oftener than once in sixty days, constitutes a contract by which instalments become due only on calls according to the terms of the agreement.⁴

¹ Stoneham Branch R.R. Co. v. Gould, 2 Gray, 277, per SHAW, C.J.; Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50; Worcester, etc., R.R. Co. v. Hinds, 8 Id. 110; Salem Mill Dam Co. v. Ropes, 6 Pick. 23; Central Turnpike Co. v. Valentine, 10 Id. 142.

² Salem Mill Dam Co. v. Ropes, *supra*.

³ Wood v. Coosa, etc., R.R. Co., 32 Ga. 273.

⁴ Mansfield, etc., R.R. Co. v. Pettis, 26 Ohio St. 259.

Where the subscription paper for the stock of a railroad company specified that the amounts therein subscribed should be expended on a particular section of the road, it was held that the company could not enforce the payment of the subscriptions upon a call for the general use of the company, although it was entitled by its charter to call for instalments on stock at such times and in such amounts as it thought proper.¹ Under a subscription agreeing to pay at such time and place as should be ordered by the directors, it was held that a subscription did not become payable until action in the manner indicated was taken by the directors at a regular meeting of the board, but that in case they did so, personal notice was not necessary.²

A subscription to stock in a railroad company is not void on account of a condition in it that interest shall be allowed and paid out of earnings on all sums assessed and paid, from the time of payment until the road shall be put in operation.³ In such case, interest, though accruing, would not be payable until the road was operated and had net income sufficient for the purpose. The contract of

¹ Roberts v. Mobile, etc., R.R. Co., 32 Miss. 373.

² Ross v. Lafayette, etc., R.R. Co., 6 Ind. 297. Where the subscription paper of a railroad company which persons signed, contained a proviso that if a certain city subscribed a given amount, the city should accept, as part of its subscription, what each of the individuals had subscribed above a specified sum, and the city having so subscribed, the directors of the company passed a resolution authorizing the original subscribers to transfer to the city stock subscribed for by them, as stipulated in the subscription paper, it was held that the original subscribers were not liable for such excess, either to the company or to its creditors, the capital stock of the company not being

lessened by the arrangement, but there simply being a substitution of one subscription for another. Burke v. Smith, 16 Wall. 390. The subscription of a party different in its terms, from that of others, reserves to him, as a member of the corporation, no privilege, and creates for him no exemption not common to the rest; all being entitled to stand on equal terms, and to have their subscriptions subject to the same liabilities. Mann v. Cooke, 20 Conn. 178.

³ Rutland, etc., R.R. Co. v. Thrall, 35 Vt. 536; Cunningham v. Vt., etc., R.R. Co., 12 Gray, 411; Painesville, etc., R.R. Co. v. King, 17 Ohio St. 534; Lockhart v. Van Alstyne, 31 Mich. 76; Milwaukee, etc., R.R. Co. v. Field, 12 Wis. 340.

subscription for shares in a railroad corporation provided that subscribers should have the privilege of paying in at any time the whole or any part of their subscription, and should receive interest thereon until the road went into operation. As the contract did not definitely fix the time when the interest should become due, the court said that it was unreasonable to suppose that the corporation intended to agree to pay it to subscribers while the road was in process of construction, and when it would require its funds to defray the necessary charges of building the road, and before the company was in receipt of any income; and that it was much more in accordance with the object the parties had in view to infer that interest was to be paid after the assessments had all been paid in, the road completed and in operation, and the company was in receipt of income from its business; that if this were not so, each subscriber might make a demand at his own pleasure, and the result would be that the corporation would be harassed by constant and irregular demands.¹ On the same subject the Supreme Court of Vermont said: "In the early stages of such undertakings, the use of money for the construction of the road may be presumed to be worth the legal interest; and therefore he who pays early, practically contributes more than he who pays the same sum late. This arrangement for the payment of interest, or interest dividends so called, is equitable and just, as it is but a mode of distributing benefits among the stockholders in proportion to the aid they have respectively contributed to the common enterprise, and thus producing equality between them. Equality is equity as between the stockholders; and such payment made out of the surplus earnings not needed for the payment of debts of the corporation, nor for the prosecution of its business, does not interfere with the rights

¹ Waterman v. Troy, etc., R.R. Co., R.R. Co. v. County of Allegheny, 63 8 Gray, 433. See Pittsburg, etc., Pa. St. 126.

of creditors, nor contravene any principle of public policy. It is no more withdrawing capital from the corporation than would be the payment of ordinary dividends to which purpose the fund would otherwise be appropriated."¹

§ 184. Validity of subscription.—Subscriptions for stock must be founded on a valid consideration and constitute a contract binding on both parties *eo instanti*. "No person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop both parties, but no contract or subscription can be valid if not conforming to the statute. . . . Where persons subscribe for a future organization, their mutual agreements for a common enterprise may operate as mutual considerations until the enterprise becomes organized, and thereby the common interest is carried into its proposed form. But where the corporation is already in existence, a stock subscription is a transaction between the subscriber and the company, and the obligation of one, can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound, and the transaction is a nullity."² A subscription contained the following condition: "We shall not be holden to pay the sum subscribed by us, unless the

¹ Richardson v. Vt., etc., R.R. Co., 44 Vt. 618. See Troy, etc., R.R. Co. v. Tibbits, 18 Barb. 297; Miller v. Pittsburgh, etc., R.R. Co., 40 Pa. St. 239.

² Carlisle v. Saginaw, etc., Co., 27 Mich. 315. Where the statute provides that the residence of a subscriber shall be stated in the articles of association, a double inverted comma under the name of a place previously written, is sufficient. Steinmetz v. Versailles, etc., T. Co., 57 Ind. 457. Under an

act which provides that the evidence of organization shall be a certificate under the hands and seals of the persons associated, recorded in the county clerk's office, and a copy be filed in the office of the secretary of state, until the certificate is made, no legal being known by the name designated in the articles exists, and those who do not unite in such certificate, are not members of the association. Burrows v. Smith, 6 Seld. 550.

aggregate of our subscriptions and of contributions to this object shall, by the 1st of July, 1834, amount to \$50,000." On the 19th of the previous June, certain responsible persons signed a paper by which, "for value received," they undertook to pay to the corporation any deficiency in the subscriptions which should exist on the 30th of the same month. On the same day the trustees passed a resolution that "this board pledges itself to continue to raise subscriptions and contributions after the 1st of July, to save harmless those persons who may pledge themselves to make good any deficiency which may be found to exist on the last day of June instant." Nothing was ever paid on account of the paper, and none of the signers were called upon to make a payment. It was held that as they were not actual donors upon the same terms of equality and mutuality as the subscriptions of other persons, their subscriptions were invalid, and the original subscribers never became liable upon their subscriptions.¹

The promise of the subscriber being based upon the expectation of becoming a stockholder, if the right to the stock is not consummated, the obligation to pay the subscription is not binding.² A writing that "the undersigned propose to subscribe for the number of shares to the capital stock," etc., "when the charter shall have been obtained," etc., is an agreement to subscribe, for the breach of which the obligor is only liable in damages, and is not a subscription to the stock.³ Where the charter of a cor-

¹ Stewart v. T. of Hamilton College, 2 Denio, 403. This case came within the New York statute of frauds as it then existed. The first subdivision of the second section read thus: "In the following cases, any agreement shall be void unless such agreement, and the consideration thereof, be reduced to writing at the time the same is made, and be subscribed by the party by whom it is to be performed, and by all

the parties where such agreement contains promises to be performed by each of them." N. Y. Rev. Sts., 2d Ed., Vol. 3. Appendix, p. 656.

² Taggart v. Western Md. R.R. Co., 24 Md. 563. See Ridgefield, etc., R.R. Co. v. Brush, 43 Conn. 86.

³ Mt. Sterling Coalroad Co. v. Little, 14 Bush. Ky. 429. See Troy, etc., R.R. Co. v. Tibbits, *supra*.

poration prescribes a form in which subscriptions for stock shall be taken, and the subscription paper contains, besides the form directed, stipulations not inconsistent therewith and which it is competent for the corporation to make, the subscription is valid.¹ A provision in the act that "the associates shall severally subscribe," is not complied with by subscribing "Estate of A. B."² But a subscription by a firm name, is within the scope of an act which requires each subscriber to sign "his name."³ The subscription paper to a hotel company stated that it was to raise capital stock not exceeding one hundred thousand dollars, and that the subscribers promised, each for himself, to pay into the funds of the company, in such instalments as the president and directors might under the provisions of the law require, one hundred dollars for each share set against their names respectively. It was held that though the subscription was not dated, that did not invalidate it, as the exact time when it was signed was not material.⁴

When commissioners are appointed to receive subscriptions to the stock of a corporation, their power must be strictly pursued. But in Pennsylvania, where commissioners to receive subscriptions to the stock of a railroad company for the purpose of obtaining a charter, had no power under the statute to receive any other than unconditional subscriptions with the payment of five dollars on each share, it was held that such as were conditional were valid, and to be deemed absolute. The court said: "Either the defendant in error became a corporator on the issuing of the letters patent, by virtue of his subscription, and the

¹ Fisher v. Evansville, etc., R.R. Co.,
7 Ind. 407.

² Troy, etc., R.R. Co. v. Warren, 18
Barb. 310.

³ Rensselaer, etc., P. R. Co. v. Wetsel,
21 Barb. 56.

⁴ City Hotel v. Dickinson, 6 Gray,
586. It seems unnecessary to say,

though it appears to have been made the subject of a legal decision, that one corporation cannot recover upon subscriptions made to another corporation, though the main object of the two is the same. Thrasher v. Pike County R.R. Co., 25 Ill. 393.

payment of five dollars for each share, or the subscription amounted to nothing. . . . Certainly it was operative for some purposes. It enabled the commissioners to receive and to retain five dollars paid upon each share subscribed, and it aided in obtaining the letters patent. On the faith of it, the commonwealth parted with the franchise conferred upon the company. If such subscriptions, with such conditions, are invalid, then the whole capital of a company might be withheld, even after charter granted, and the objects of the grant entirely defeated. It is not for the defendant to say that his subscription is a nullity; that he assumed no liability when his act induced the grant of the charter, and fastened upon his co-corporators the obligation to pay the amount of their subscriptions. It is the condition of the subscription which is the illegal part; it is that which is repugnant to the nature of a subscription, and which is in conflict with the policy of the law, and therefore the defendant cannot assert it. . . . The thing provided for could only be determined after the organization of the company. The words of the condition show this. The defendant promised to pay provided the road goes within half a mile of Florence. The payment of the subscriptions was necessary to enable the road to go anywhere; no other means was provided for either the location or construction of the road. Payment was therefore necessarily antecedent to a compliance with the condition. But if it is a condition subsequent and illegal, as we have endeavored to show, then it is void, and the subscription is in law absolute."¹ Subscriptions in one State to the stock

¹ Pittsburgh, etc., R.R. Co. v. Biggar, 34 Pa. St. 455. See Bavington v. Pittsburgh, etc., R.R. Co., Ib. 358. Where commissioners are intrusted by the legislature with the power of determining whether the stipulated sum has been subscribed before a corporate body can be constituted, their acts can

only be examined in a proceeding against the alleged corporation to inquire into the validity of its charter. Tar River Nav. Co. v. Neal, 3 Hawks, 520. In case commissioners are specially deputed by the legislature to superintend subscriptions to a bank, and to decide and certify when the

of a company incorporated under the laws of another State, and having its place of business there, are to be governed by the laws of the latter.¹

§ 185. Presumption as to validity of subscription.—When the name of an individual appears on the books of a corporation as a stockholder, the presumption is that he is the owner of the stock, in a case where there is nothing to rebut the presumption; and, in an action against him as a stockholder, the burden of proving that he is not such is cast upon him.² In a suit by a corporation to recover the amount of a subscription to its stock, it was held that as the charter had given authority to take subscriptions without specifying any particular manner in which it should be done, and the defendant had offered no proof that the mode adopted in taking his subscription was at variance with any law applicable to the subject, the presumption was that the contract was valid.³ The heading, directed by the act, of a subscription-book to stock, was : "We promise to pay the president, managers, and company of," etc. It was held, that though the word "president" was omitted, there was enough in the other expressions to describe the corporation intended, and to effectuate the contract; that to maintain a suit, it was not necessary to prove that the notice, previous to opening the books, was regular, but that the jury might presume that it was given according to law.⁴

stockholders may enter upon the appropriate business of the institution, the doings of the commissioners in relation thereto, are conclusive as between the subscribers and the corporation. *Litchfield Bank v. Church*, 29 Conn. 137. Where the charter of a railroad company appointed commissioners to open books for subscriptions to the stock, and, after a certain amount had been subscribed, to call the first meeting of the stockholders for the purpose of choosing directors, it was held that the

powers of the commissioners ceased upon the election of the directors, and the latter had power to receive further subscriptions. *Ellison v. Mobile, etc., R.R. Co.*, 36 Miss. 572.

¹ *Penobscot, etc., R.R. Co. v. Bartlett*, 12 Gray, 244.

² *Turnbull v. Payson*, 95 U. S. 418.

³ *Wellersburg, etc., P. R. Co. v. Young*, 12 Md. 476.

⁴ *H. T. R. Co. v. Cruger*, 5 Har. & Johns, 122.

Where a person signs the subscription-book of a corporation in blank for the purpose of influencing other subscriptions, he will be deemed, as to the creditors of the corporation, to have authorized those empowered to take subscriptions to fill up the blank, and this having been done, he will be estopped from questioning their authority to do so.¹ In a subscription to stock by a municipal corporation, if, in any state of the case, or under any circumstances, it was authorized to make it, the presumption is, that inasmuch as it was acting under official responsibility, its act is regular and legal. The making of the contract is of itself an assertion of authority on its part to make it, and is at least *prima facie* evidence, as against it, of the existence of such authority.² Where a county subscribes to the capital stock of a railroad company, the fact that no subscription was formally made upon the books of the company is immaterial. A resolution by the board of supervisors declaring the subscription made, and an acceptance of it by the company, with notice of the same, is sufficient.³ When a county court makes an unconditional subscription for capital stock in a railroad company, pursuant to legal authority, the subscription becomes absolute, the claim thereon is a part of the assets of the company, and creditors may rely upon it for payment of their debts, the same as upon any other assets of the company, and this, notwithstanding

¹ Jewell v. Rock River Paper Co., 101 Ill. 57. See Beecher v. Dillsburg, etc., R.R. Co., 76 Pa. St. 306.

² Shelbyville v. Shelbyville, etc., T. Co., 1 Metc. Ky. 54.

³ Nugent v. Supervisors, 19 Wall. 241; Clarke County v. Paris, etc., T. Co., 11 B. Mon. 143. Where an act authorizes county commissioners to subscribe for stock in a railroad company, after the amount of such subscription shall have been designated, advised and recommended by a grand

jury, the commissioners are not justified in subscribing to such stock by a paper in which the grand jury recommend the commissioners to subscribe to the capital stock of the company to such an amount as may be authorized by the act of assembly, not exceeding \$150,000. All discretionary power was, by the act, conferred upon the grand jury, and they could not delegate any part of it to the county commissioners, or to any other person. Mercer County v. Pittsburg, etc., R.R. Co., 27 Pa. St. 389.

standing the company, subsequently to the making of the subscription, may have abandoned all proceedings under its charter, on account of its insolvency.¹ The county court can act only through its orders made of record, and which are signed by the presiding justice. Such an order declaring that the court thereby subscribes the shares which it was authorized to subscribe, is evidence of the highest obligation which the court can impose upon itself. So far as any subscription by the court could bind it, its order having been accepted by the corporation as a conditional subscription, is as obligatory as a formal entry on the books of the corporation could have made it.²

¹ Morgan County v. Thomas, 76 Ill. 120; Henry v. Vermillion, etc., R.R. Co., 17 Ohio St. 187.

² Justices of Clarke County v. Paris, etc., T. Co., 11 B. Mon. 143. The relation of stockholder may be created not only by the usual formalities of subscription and the acceptance of stock, but by conduct on the part of the person sought to be charged. In Griswold v. Seligman, 72 Mo. 110, some of the leading decisions on the subject were referred to as follows: Where there has been a course of dealing between the person sought to be charged as contributory and the company by which he has been permitted to become a shareholder *de facto*, a valid and binding contract is thereby created. One person who, though not a subscriber, had paid a call as such, and another who had attended the half-yearly meeting of the members, were held estopped in an action for calls to deny their membership. Railway Co. v. Graham, 2 Eng. R.R. Cas. 870; Railway Co. v. Gunstone, Ib. A similar decision was rendered where the defendant had represented himself to the company as the owner of shares, claiming to be registered as such in conse-

quence of scrip certificates purchased by him and sent in to the company, for which he had receipts and a notice that the scrip would be exchanged for sealed certificates on demand, although the provisions of the act necessary to make him a stockholder had not been complied with, by the registry of his name, or the entry of transfer. Railway Co. v. Daniel, 2 Eng. R.R. Cas. 728. And see Railway Co. v. De Medina, Ib. 735; Straffon's Ex'rs' Case, 1 De G. M. & G. 576 and cases cited; Maguire's Case, 3 De G. & S. 31. A person who, though released from his subscription, afterward voted at the annual meeting for directors, was elected one of the directors, acted as such and as a stockholder, and paid money to the company voluntarily, was held liable in an action for calls, his acts justifying the presumption that he had resumed his original obligation as a stockholder. Railroad Co. v. Stewart, 41 Pa. St. 54. So one who had been elected a member of a parish, voted at the meetings, and been a trustee of the parish funds, was held a member and liable to arrest for a parish debt, though he had not pursuant to the statute filed a certificate of membership. Chase v.

§ 186. Subscription by agent.—If one subscribe to the capital stock of a corporation for and in the name of another without authority, he thereby binds himself and becomes the equitable owner of the stock. A transfer from the person in whose name the subscription is made is not necessary. It is sufficient if the stock be carried to the account of the subscriber on the books of the corporation.¹ But when a party pays for another person without his knowledge the amount required by the charter to be paid at the time of subscription, if such person afterward ratifies the act of his assumed agent, the payment will render the contract of subscription binding, the ratification being equivalent to a precedent authority.² Where an unauthor-

Bank, 19 Pick. 584. Whenever a stockholder by his acts and representations is estopped by his conduct from denying his liability as a stockholder to the company, he is likewise precluded from denying his liability to creditors. "If a person is a member of a company as between himself and the company, then whether he is so or not by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought upon principle to be deemed a member to all intents and purposes." Lindley on Partn. 129. See Davidson's Case, 3 De G. & S. 21; Carver v. Upton, 91 U. S. 64; Sanger v. Upton, Ib. 56. In Wheelock v. Kost, 77 Ill. 296, which was a proceeding by creditors, a party loaned money to a national bank, and received as collateral security the bank's certificates of stock issued in pledge. Afterward he received semi-annual dividends thereon, and it was held that he was liable as a stockholder. The court said: "Whatever relation appellant may have sustained to the corporation of the bank, it seems clear that as to the creditors, he occupied the position of stockholder, and must

bear all the burdens that relation imposed. The stock had in fact been transferred to him. It stood in his name as owner, and he availed himself of the dividends it earned. Having voluntarily assumed the relation of stockholder, it makes no difference whether he may have done it to assist the bank in its credit, or otherwise." Approved in Pullman v. Upton, 96 U. S. 328. See Johnson v. Laflin, 5 Dillon, 65.

¹ State v. Smith, 48 Vt. 266; Ticonic Water Power Co. v. Lang, 63 Me. 480. See Penal Code of N. Y., sec. 590.

² Fiser v. Miss., etc., R.R. Co., 32 Miss. 359; Miss., etc., R.R. Co. v. Harris, 36 Id. 17; Musgrave v. Morrison, 54 Md. 161. See Granger, etc., Co. v. Vinson, 6 Oregon, 172. A letter of attorney constituting the agent the person's proxy to vote on the stock at a corporate meeting would be evidence of ratification to go to the jury. But an incomplete letter of attorney to vote on a renewal of the charter and upon the acceptance of any subscription that might be tendered for stock, would not render a person liable on a subscription from which he had once

ized agent subscribes for stock in the name of another, and immediately notifies the other of what has been done in his name, the circumstances may be such as to justify the conclusion that a long-continued silence (in this case seven years) of the *quasi* principal ratifies the subscription. The facts and circumstances connected with the subscription, and with such silence, are at least evidence to go to the jury.¹ The defendant and others subscribed the following paper: "We, the subscribers, for value received, promise to pay John H. Boyd and Isaac Wood \$100 for each share subscribed by us and set opposite our respective names, for the purpose of building a plank road; and the said Boyd and Wood shall have the right, and we hereby authorize them to transfer the subscriptions to a company to be hereafter formed for the purpose of building said road." It was held that Boyd and Wood were fully authorized to transfer to the company the subscription of the defendant, and that such transfer vested in the company the title to the subscription and authority to collect the money to become due on it.² The defendant's subscription was made in his name under a power of attorney authorizing the attorney to subscribe for one hundred shares of the stock, and to do whatever was necessary to be done in the premises. It was held that a payment by

been released by the neglect of the corporation. McCully v. Pittsburg, etc., R.R. Co., 32 Pa. St. 25. Where A. subscribes to stock for B., and the latter pays the instalments and ultimately receives the scrip, he is the subscriber and a stockholder from the time the corporation has either franchises or property; A. being merely an agent, and in no sense a trustee, even though the original subscription was in his own name. Burr v. Wilcox, 22 N. Y. 551. An illegal subscription to railroad stock by a city may be rati-

fied under a subsequent act of the legislature authorizing its ratification. Putnam v. New Albany, 4 Biss. 365.

¹ Phila., etc., R.R. Co. v. Cowell, 28 Pa. St. 329. A. subscribed for shares of stock in the name of B. without authority. It was held that the subsequent declarations of B. to a third person that he had such an amount of stock in that corporation was not a ratification of the subscription. Rutland, etc., R.R. Co. v. Lincoln, 29 Vt. 206.

² Eastern P. R. Co. v. Vaughn, 20 Barb. 155.

the attorney of ten per cent. required by the charter made the subscription valid, though the defendant had furnished no funds for the payment nor given the attorney express authority to make it.¹ Notwithstanding a party act for a corporation in obtaining subscriptions to its capital stock without authority, yet if his acts are adopted and ratified by the corporation, they will bind it and the subscription be valid.² A bill filed by the E. M. Company against the O. Company for the purpose of enforcing a vendor's equitable lien, alleged that the complainant sold to the defendant certain real estate for the sum of \$25,000, and on the same day executed and delivered a deed for the same, but that although the defendant entered into and had been in possession of the property ever since, it had failed to pay to the complainant the consideration mentioned in the deed. The answer admitted the execution and delivery of the deed, but averred that in compliance with the understanding of the parties payment for the property purchased of the complainant was to be made in the stock of the defendant, and that in fulfilment of such agreement the complainant, through its president, subscribed for two hundred and fifty shares of the stock of the defendant and received the certificate of the same, and that, as owner of said stock, it had since held and voted it. The averments of the answer having been proved, it was held that the contract was binding on the E. M. Company, and that the fact that the president of that company voted the stock at the meetings of the O. Company was sufficient evidence that he was the authorized agent of the E. M. Company to receive and hold the certificate.³

¹ Litchfield Bank v. Church, 29 Conn. 137.

² Walker v. Mobile, etc., R.R. Co., 34 Miss. 245.

³ Elysville Manuf. Co. v. Orisko Co., 5 Md. 152, aff'g 1 Md. Ch. 392.

Though an agent is authorized by a corporation to receive subscriptions to its stock, notice to such agent of the cancellation of a subscription is not sufficient notice to the corporation. But where a person is soliciting sub-

§ 187. Lapse of time affecting subscription.—Although the statute of limitations does not run against a corporation on subscriptions to its stock until a call or demand for an instalment, yet if no call be made within the statutory time of limitation from the date of the subscription, the corporation will be deemed to have abandoned the contract from analogy to the statute;¹ and the silence of a subscriber while large expenditures are being made, after he is released, will not be construed into a new promise.² Where a subscriber for shares who was also the agent of the corporation for obtaining other subscriptions, retained the subscription-book a long time before handing it in, it was held that the statute of limitations did not begin to run against his subscription until the book was delivered to the corporation; and that the fact that the agent wrote to the corporation more than six years after the date of his subscription, stating the number of shares taken by each subscriber, followed, a few months later, by the delivery of the book to the corporation, constituted a new obligation or acknowledgment of the original subscription.³ If the undertaking be not commenced *bona fide* within the period prescribed by the charter, the subscribers are released; but acquiescence and assent will estop a subscriber from setting this up as a defense.⁴ Where the enterprise (a turnpike) was not abandoned, but the board of directors continued to hold regular meetings and to make efforts to procure subscriptions to enable them to complete the road, which was finally done; it was held that the road was established

scriptions without authority from the corporation, he is the agent of the subscribers, and notice to him by a subscriber before the list has been delivered to and accepted by the corporation that the subscriber wishes his name erased, relieves him of liability. *Lowe v. E. K. R.R. Co.*, 1 Head. Tenn. 659.

¹ *Pittsburg, etc., R.R. Co. v. Byers*, 32 Pa. St. 22; *Gibson v. Columbia, etc.*, T. B. Co., 18 Ohio St. 396.

² *Pittsburg, etc., R.R. Co. v. Graham*, 2 Grant Pa. 259; S. C. 36 Pa. St. 77.

³ *Pittsburg, etc., R.R. Co. v. Plumer*, 37 Pa. St. 413.

⁴ *McCully v. Pittsburg, etc., R.R. Co.*, 32 Pa. St. 25.

in a reasonable time, that is, as soon as the necessary means could be obtained, though it took thirteen years.¹

§ 188. Payment on subscription.—Payment for stock may be made in labor, or in property needed by the corporation for its operations.² Where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground for complaint. The case is different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments have been paid. In that case, there is still a debt due to the corporation, which, if the corporation becomes insolvent, may be sequestered in equity by the creditors as a trust fund liable to the payment of their debts. But when full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious over-valuation of property would be strong evidence of fraud.³ “The earlier cases held that the contract of the subscribers could only be fulfilled by payment in money. In later cases this doctrine has been relaxed, and stock issued and paid up in work and labor, or in the purchase of property the corporation is authorized to hold, has been held to have been legally issued.

¹ Gibson v. Columbia, etc., T. B. Co., *supra*.

² Ashuelot Boot & Shoe Co. v. Hoit, 56 N. H. 548; Boston, etc., R.R. Co. v. Wellington, 113 Mass. 79; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Searight v. Payne, 6 Lea Tenn. 283; Hayden v. Atlanta Cotton Factory, 61 Ga. 233; Phelan v. Hazard, 5 Dillon, 45; Steacy v. Little Rock, etc., R.R. Co., Ib. 248. It was held in Missouri that stock in a corporation organized for the purpose of building a bridge across the Mississippi River,

might be paid for by the proprietor of a newspaper by the publication by him in his paper, from time to time, of statistical articles and communications furnished by the friends of the bridge favoring the enterprise and showing its value as an investment. Liebke v. Knapp, 79 Mo. 22.

³ Coit v. Gold Amalgamating Co., 119 U. S. 343; Carr v. Le Fevre, 27 Pa. St. 413; Boynton v. Hatch, 47 N. Y. 225; Van Cott v. Van Brunt, 82 Id. 535; Am. Dig. Jan. 1887, p. 25.

Statutes have also been passed authorizing corporations to purchase property needed for their business, and to issue stock in payment for it, or to accept such property in payment for subscriptions to the capital stock. But in all such cases, transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property payable in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money, or what may fairly be considered as money's worth.¹ "We take the law to be well settled, that a company may receive in payment of its shares of stock any property which it may lawfully purchase; and so long as the transaction stands unimpeached for fraud, courts will treat as a payment that which the parties themselves have agreed shall be a payment, and this too where the rights of creditors are involved."² "If there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once

¹ Wetherbee v. Baker, 35 N. J. Eq. (8 Stewart) 501, per DEPUE, J. See Dayton, etc., R.R. Co. v. Hatch, 1 Disney, 84; New York, etc., R.R. Co. v. Hunt, 39 Conn. 75; Phillips v. Covington, etc., Bridge Co., 2 Metc. Ky. 219; Pittsburg, etc., R.R. Co. v. Stewart, 41 Pa. St. 54; Nippenose Manf. Co. v. Stadon, 68 Id. 256. The second section of the act of New York of 1853, ch. 333, which amends the act authorizing the formation of corporations for manufacturing and other purposes, Ch. 40, Sess. L. of 1848, confers authority upon the trustees of any such company to purchase property "necessary for their business, and to issue stock to the amount of the value there-

of in payment therefor." The words "value thereof" mean the fair valuation of the property, considering the purposes for which it is to be used, the nature of the business for which it is purchased, and for which the corporation is organized. This rule authorizes wide latitude in the determination of the question of value. Boynton v. Andrews, 63 N. Y. 93. See Boynton v. Hatch, 47 Id. 225; Schenck v. Andrews, 57 Id. 133; Douglass v. Ireland, 73 Id. 100; Lake Superior Iron Co. v. Drexel, 90 Id. 87; Coit v. N. C. Gold Amalgamating Co., 14 Fed. Rep. 12.

² Brant v. Ehlen, 59 Md. 1. See State v. Wood, 84 Mo. 378.

in shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, there is no necessity that the formality should be gone through of the money being handed over and taken back ; but that if the two demands are set off against each other, the shares have been paid for in cash.”¹ In Kentucky, a party when sued on his subscription to the stock of a railroad company, set up in defense that the agents of the company who had obtained the subscription had agreed that he should be allowed in discharge of it any damage he might sustain by reason of the railroad crossing his land, and should be paid any surplus for such damage over and above the amount of his stock ; and that the road had been constructed through his farm, cutting off his outhouses from his dwelling, and otherwise greatly injuring him, for which he claimed damages under the agreement. It was held that the answer presented a valid counter-claim under the Code.² In Lorillard v. Clyde,³ the parties being competitors in the transportation business by water between New York and Philadelphia, they agreed to form a corporation under the laws of New York with a capital to be represented by specified vessels to be contributed by the parties respectively at a valuation fixed, and amounting in the aggregate to the capital. The agreement provided for equalizing the contribution of capital as between the parties, and that each should receive one-half of the capital stock. It was objected that the agreement was illegal because it provided that property should be taken to represent the whole capital at a valuation fixed by the parties. The court said : “We have not been referred to any statute which pro-

¹ Spargo’s Case, 8 L. R. Ch. 412, per Sir Wm. JAMES, L. J.

² Louisville, etc., R.R. Co. v. Thompson, 18 B. Mon. 735.

³ 86 N. Y. 344.

hibits the organization of a corporation of the character of the one contemplated by this agreement, on the basis of chattel property contributed by the corporators. It cannot be assumed that the transaction was not *bona fide*, or that the valuation put on the vessels was fictitious or extravagant. The value of the stock would depend on the value of the property and business. The parties fixing the valuation were the only parties in interest, and we know of no principle of public policy which condemns an agreement between parties about to form a corporation because by the arrangement the capital stock is to be represented by property which they severally contribute at a valuation agreed upon between themselves. If it had appeared that the organization of the corporation in this way was a device to defraud the public, by putting valueless stock on the market having an apparent basis only, a different question would be presented."

As the capital stock of a corporation is a trust fund for the payment of its debts, the directors will not be permitted to waste it either directly by releasing subscribers from their subscriptions, or by receiving payment for stock in the form of property or services at more than a sum which a faithful trustee in the honest exercise of his judgment might deem the value; as by issuing shares to a contractor for work not performed and the value of which could not have been known.¹ The assignment to a corpora-

¹ Barnes v. Brown, 11 Hun, 315. If the directors have power to release a subscription (which is doubtful), the subscriber must elect to avail himself of the release within a reasonable time. Penobscot, etc., R.R. Co. v. Dunn, 39 Me. 587. As capital stock is not property until it is subscribed for, the power given to the directors in the charter to sell the property of the corporation does not apply to the disposition of capital stock; and the power to determine the terms and time of payment of subscriptions for stock has no reference to the price. Sturges v. Stetson, 1 Biss. 246. Corporations may purchase their own stock in exchange for money or other property, and hold, reissue, or retire the same, provided such act is had in entire good faith, is an exchange of equal value, free from fraud, the corporation not insolvent, nor in process of dissolution, and the rights of creditors not affected.

tion, in payment for stock, of a patent which is afterward ascertained to be worth nothing, cannot be regarded as money or its equivalent, because those engaged in the management of the corporation believed at the time that the patent was valuable, and received it upon some fixed estimate of value between them and the subscriber as so much money. Before a thing can be so regarded, it must have an actual value, so fixed that it can at once be changed into money.¹

The officers of a railroad corporation may lawfully enter into an agreement to build the road and pay for the construction of it in stock or bonds; and where the contract is made in good faith, and with no fraudulent intent, the contractor, who is entitled to stock at its market value, will not be liable to creditors of the corporation for the difference between the market value and the par value, even though such stock should afterward prove to be worth more than the amount allowed for it.² The subscription of M. & Co., as it stood on the books of the corporation, was apparently upon the same terms as the other subscriptions; but by a private parol arrangement between them and the directors, it was agreed that they should have the contract for constructing the work, that only fifty per cent. of the stock so subscribed should be paid in cash, and that payment for the remainder should be made in work. It was well known to the directors that M. & Co. had not the pecuniary ability to pay for the stock in cash. Some days after their sub-

Clapp v. Peterson, 104 Ill. 26. As to power of a corporation to take and transfer its own stock, see 3 Blatchf. 431.

¹ Tasker v. Wallace, 6 Daly, 364; Chisholm v. Forny, 65 Iowa, 333. When the par value of shares is named in the articles of association, a subscription payable in stock of another company which is below par, is not a subscription for the full number of

shares taken. Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50.

² Van Cott v. Van Brunt, 82 N. Y. 535; S. C. 2 Abb. N. C. 283. There is no rule of public policy requiring the court to relieve a corporation from a contract, otherwise without objection, binding it to deliver shares of its stock below the par value. Otter v. Brevoort, 50 Barb. 247.

scription, a written agreement in accordance with the previous parol one was executed between them and the officers of the corporation. The other stockholders had no knowledge of either agreement. It was held that the subscription was valid.¹ Upon a contract with a railroad company to do work in the construction of the road, payment to be made partly in cash and partly in stock, the contract being silent as to the time and place of payment, looking to the contract alone, the contractor could not call for the payment either of cash or stock until a complete performance of the contract; nor could he sue for and recover the stock without proof of a special request and a refusal to deliver it. But as to the time of payment, that might be inferred from other evidence, such as the usage of the company in paying its contractors, the acts of the parties, or the course adopted by them under the contract. As to the place of payment, it would be the duty of the company, at or within the time, to tender the stock to the contractor.²

When a party gives to a corporation a promissory note for stock, and takes a receipt that such note when paid will be in full for shares, it is an agreement on the part of the corporation to sell prospectively and conditionally, and the maker does not become a stockholder until the note is paid.³ Under the general railroad act of New York of

¹ Ridgefield, etc., R.R. Co. v. Brush, 43 Conn. 86. Compare New York, etc., R.R. Co. v. Hunt, 39 Id. 75.

² Boody v. Rutland, etc., R.R. Co., 24 Vt. 660. Under an agreement entered into with the agents of a corporation for the payment of subscriptions in the stock of another corporation, the subscriber is not liable for the payment of cash, although not so expressed in the subscription paper. Swatara R.R. Co. v. Brune, 6 Gill, 41. Where the president of a corporation was authorized to receive subscriptions for stock,

and he took in payment of stock subscribed for shares in another corporation, it was held that the act was binding on the corporation, unless he had no power to receive anything but money, notwithstanding his authority might have been so limited in terms. East New York, etc., R.R. Co. v. Lightfall, 6 Roberts, 407.

³ Tracy v. Yates, 18 Barb. 152; Busey v. Hooper, 35 Md. 15. See Water Valley M. Co. v. Seaman, 53 Miss. 655.

1850, a person at the time of subscribing to the stock of a railroad company, made no cash payment, but gave his note for ten per cent., and subsequently gave notes for instalments as called for, which notes were paid on a judgment in favor of an innocent holder. It was held that a contemporaneous cash payment at the time of subscribing was not essential to the validity of the subscription. WRIGHT, J., said: "I do not think a payment necessary to complete a contract of subscription. It is rather incidental and collateral, is not inherent in the contract, and forms no part of the consideration. The directors may be liable for a breach of duty; but, so far as the subscriber is concerned, his obligation to pay arises when he subscribes."¹ A corporation, after its organization, became successor to the business of a copartnership by purchasing its property and entering upon the same business. The corporation being indebted to the copartnership on account of this purchase, received from a stockholder, in payment of his subscription to the stock, a note held by him against the copartnership. It was held that although the corporation might have insisted upon payment for the stock in cash, yet the acceptance of the note, which, under the circumstances, was equivalent to money, was not improper.²

Although when the charter prescribes that a certain sum of money shall be paid at the time of subscribing, no right can be acquired or duty imposed without conforming with the provision; yet when the amount is paid subsequently,

¹ Ogdensburg, etc., R.R. Co. v. Wolley, 1 Keyes, 118; 34 How. Pr. 54, JOHNSON and HOGEBOOM, JJ., dissenting. Where the act provided that one thousand dollars worth of stock for every mile of a proposed railroad should be subscribed, and ten per cent. paid thereon in good faith, it was held that it did not require a specific payment of ten per cent. by each sub-

scriber; but if the sum named per mile had been subscribed and ten per cent. paid thereon before the articles were filed, it was not material that there were other subscriptions upon which the ten per cent. was not paid. Ogdensburg, etc., R.R. Co. v. Frost, 21 Barb. 541.

² Stoddard v. Shetucket Foundry Co., 34 Conn. 542.

and before any calls are made for instalments on the stock, it is an affirmation of the previous subscription, which gives it the same effect as if the subscriber had again affixed his name to the subscription paper.¹ In Pennsylvania, where the act of incorporation provided that any person offering to subscribe should previously pay to the attending commissioners the sum of five dollars for every share subscribed, it was held that the commissioners had no right to receive a subscription, or the corporation to ratify it, without the payment of the sum mentioned, and that a subscription without such payment was void *ab initio*.² If, however, the act provides for chartering the company when a certain

¹ Fiser v. Miss., etc., R.R. Co., 32 Miss. 359; Barrington v. Miss. Cent. R.R. Co., Ib. 370. A payment need not necessarily be exactly contemporaneous with the subscription. If made and accepted anterior to that time, the subscription will be valid. Under a statute providing that no subscription to the capital stock of certain corporations should be received unless at the time of making it the person subscribing should pay ten per cent. of the par value of the stock subscribed for in cash (Laws of N. Y. of 1875, ch. 611, p. 756, sec. 5), the execution and delivery of the subscriber's check for the ten per cent., payment of which is countermanded by him before it is presented for payment, does not constitute a valid subscription. The subscription and payment of the ten per cent. must both concur; though subscription one day with payment the next would satisfy the statute; and so doubtless would actual payment at any period after subscription with intent to effectuate and complete the subscription. The object of the law in making the foregoing requirement was to prevent the organization of fraudulent corporations upon mere paper capital. Excelsior Grain

Binder Co. v. Stayner, 25 Hun, 91. See Syracuse, etc., R.R. Co. v. Gere, 4 Hun, 392; Black River, etc., Co. v. Clarke, 25 N. Y. 308; Beach v. Smith, 30 Id. 116; Henry v. Vermillion R.R. Co., 17 Ohio, 187; Vicksburg, etc., R.R. Co. v. McKean, 12 La. An. 638.

² Hibernia T. Co. v. Henderson, 8 Serg. & R. 219; Clark v. Monongahela Nav. Co., 10 Watts, 364. Such omissions on the part of the commissioners were cured by the subsequent acts of 1839. It was held in an early case in New York, that when commissioners are appointed to take subscriptions to the stock of a corporation, and to receive a certain amount on each share so subscribed, in order to give effect to their acts, their power must be strictly pursued, and if persons applying to become members of the corporation omit either to subscribe or pay, they do not come within the terms of admission. Such subscription without making the advance payment required by the statute, is *nudum pactum* for want of consideration. Jenkins v. Union T. Co., 1 Caines' Cases, 86, overruling S. C. 1 Caines, 381. See Smith v. Tallahassee P. R. Co., 30 Ala. 650.

number of persons have subscribed and paid a given per cent. of the stock, which is done, the duties and powers of the commissioners in respect to further subscriptions are at an end, and under a power of the corporation to enlarge its stock by new subscriptions "in such manner and form as it shall think proper," it is discretionary with it to demand or not the sum specified in the act. Even though a subscriber under the commissioners did not make the preliminary payment; if after the organization of the company he is present at a corporate meeting, he will be estopped from alleging such non-payment.¹

§ 189. Proof of subscription.—Under a charter authorizing the opening of books of subscription for capital stock, the contract must be in writing, and a contract cannot be established by parol evidence if a written contract has not been made; though if positive and direct proof be given that a subscription was made by the party sought to be charged, or by some one for him acting by his authority, and that the book or paper has been lost, the subscription may be proved by secondary evidence.² In an action upon a subscription, the subscription-book into which the subscriptions are transcribed from a paper on which they were originally written at a meeting held for the purpose of procuring subscrip-

¹ Erie, etc., P. R. Co. v. Brown, 25 Pa. St. 156; Phila., etc., R.R. Co. v. Hickman, 28 Id. 318.

² Pittsburg, etc., R.R. Co. v. Gazzam, 32 Pa. St. 340; New Hampshire, etc., R.R. Co. v. Johnson, 30 N. H. 390; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. (2 Stewart) 188; Cleveland v. Burnham, 55 Wis. 598; Mudgett v. Horrell, 33 Cal. 25; McClelland v. Whiteley, 11 Biss. 444; Iowa, etc., R.R. Co. v. Perkins, 28 Iowa, 281; Brewers', etc., Ins. Co. v. Burger, 10 Hun, 56; Turnbull v. Payson, 95 U. S. 418; Hawley v. Upton, 102 Id. 314; Fothergill's Case, L. R. 8, Ch. 270; Marlborough, etc., R.R. Co. v. Arnold, 9 Gray, 157; Boardman v. Lake Shore, etc., R.R. Co., 84 N. Y. 157. A mere verbal agreement to take stock in a corporation whose promoters are engaged in securing the amount of stock required before it can organize, does not constitute the promisor a member of such corporation, and is without a sufficient consideration to support it. Fanning v. Insurance Co., 37 Ohio St. 339. See Sedalia, etc., R.R. Co. v. Wilkerson, 83 Mo. 235.

tions, is admissible in evidence without accounting for the absence of the memorandum, when it appears that the person soliciting subscriptions was empowered at the meeting to thus transcribe the subscriptions.¹ An actual manual subscription on the books of a railroad company is not necessary to bind a municipality as a subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution that it thereby in the name and on behalf of the municipality subscribes a specified amount of stock, and presents a copy of the ordinance or resolution to the company for acceptance as a subscription, and the company accepts it and notifies the municipality or its proper agent to that effect, the contract of subscription is complete, and binds the parties according to its terms.² The written instrument of subscription to the stock of a private corporation is primarily the only competent evidence of the agreement, and its terms cannot be varied or contradicted by parol proof that at the time it was signed there was a different understanding.³ A verbal promise made by the agent of a corporation to a person subscribing for stock therein, and upon the faith of which he subscribes, that payment for his stock shall be delayed for a longer period than that prescribed by the charter, is not binding on the corporation, for the reason that a written con-

¹ Iowa, etc., R.R. Co. v. Perkins, 28 Iowa, 281. The evidence of being a stockholder to be produced at an election for directors, comprises the stock ledger, and the certificate-book and the transfer-book. In case of dispute, the transfer-book must control the rest. Downing v. Potts, 3 Zab. 66.

² Bates County v. Winters, 112 U. S. 325; Moultrie v. Rockingham Savings Bank, 92 Id. 631.

³ Grose Isle Hotel Co. v. L'Anson, 43 N. J. 442; Meth. Ch. v. Town, 49 Vt. 29; Johnson v. Crawfordsville, etc., R.R. Co., 11 Ind. 280; Roche v. Roan-

oke Classical Seminary, 56 Id. 198; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Fairfield County Turnp. v. Thorp, 13 Conn. 173; Whitehall, etc., R.R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Noble v. Callender, 20 Ohio St. 199; Smith v. Tallahassee, etc., P. R. Co., 30 Ala. 650; N. C. Railroad Co. v. Leach, 4 Jones N. C. 340; Ridgefield & N. Y. R.R. Co. v. Brush, 43 Conn. 86; Wight v. Shelby R.R. Co., 16 B. Mon. 4; McClure v. People's Freight R.R. Co., 90 Pa. St. 269; Mann v. Williams, 9 North East Reporter, 807.

tract cannot be varied by a contemporaneous parol agreement, and such a promise being inconsistent with the charter, it is void for want of power to make it.¹ The erasure of a subscription will not prevent a suit upon it, but the circumstances may be explained by parol.² A person interested in promoting the construction of a railroad, procured a subscription-book from an agent of the company, subscribed in it himself, persuaded others to subscribe, and kept the book about six months, but before returning it cut his name out because of a difference in relation to pay for his services. It was held that he was liable for the amount subscribed by him the same as though he had left his name in the book.³ In an action brought by a railroad company to recover upon an alleged subscription made by the defendant to the capital stock of the company, it appeared that prior to the organization of the company, and for the purpose of such organization, several printed subscription papers were circulated, one of which was signed by the defendant and others, the defendant agreeing therein to take one share of stock, and to pay for it \$100, and at the same time paying ten dollars on account; that all of the papers were by the consent of the subscribers delivered to the persons proposed in them as directors with the intention that they should be used in organizing the corporation; that when the persons having the papers in charge prepared them for filing in the office of the secretary of state, the signatures, including that of the defendant, were cut off from all of the papers except one, and were pasted to the paper not mutilated, and that paper with all of the signatures then attached to it, together with the affidavit of the directors as required by law, was filed in the office of the secretary of state for the pur-

¹ Thigpin v. Miss. Cent. R.R. Co., 32 Miss. 347. 16 Ind. 389; Jewell v. Rock River Paper Co., 101 Ill. 57.

² Hatch v. Dickinson, 7 Blatchf. 48; Railroad Co. v. White, 10 S. C. 155; Johnson v. Wabash, etc., Plank R. Co., 96 Pa. St. 391. ³ Greer v. Chartiers R.R. Co., 96 Pa.

pose of organizing the corporation ; that the paper to which the defendant's signature was pasted corresponded exactly to the one signed by him ; and that the signature of the defendant was so cut from the one heading and pasted to another by the persons to whom had been intrusted the duty of preparing the articles of association for filing, without the defendant's knowledge, for convenience, without any idea of changing the defendant's liability, and that the papers were used for the purposes the defendant intended. It was held that the act of the persons who prepared the articles of association for filing, in cutting off the signature of the defendant from the heading to which it was signed and pasting it to another like heading, did not avoid the defendant's subscription, and that the plaintiff was entitled to recover.¹ If a person holds himself out as a subscriber by serving as a director, offering to transfer shares, or making payments in instalments, he will be estopped from denying that he did in fact subscribe.² Where it is set up as a defense to a note given in payment of a subscription to a corporation that the maker subscribed upon condition that the subscription should not be binding until a specified amount was subscribed, the burden is upon the defendant to show that such sum has not been subscribed.³

§ 190. Change releasing subscriber.—The relation between a corporation and a stockholder being one of contract, an act of the legislature which, without his assent, authorizes a material change in the powers or purposes of the corporation not in aid of the original object, if acted upon by the corporation, is not binding on him, and releases him from the payment of his subscription.⁴ Signing a prelim-

¹ Sodus Bay, etc., R.R. Co. v. Hamlin, 24 Hun, 390.

² Hays v. Pittsburg, etc., R.R. Co., 38 Pa. St. 81; Graff v. Pittsburg, etc., R.R. Co., 31 Id. 489.

³ N. Y. Exchange Co. v. De Wolf, 5 Bosw. 593.

⁴ McCray v. Junction R.R. Co., 9 Ind. 358; Marks v. Junction R.R. Co., 13 Id. 387; Hartford, etc., R.R. Co. v.

inary paper with a view to the organization of a corporation for a specific purpose, does not render the subscriber liable to a corporation organized for a different purpose.¹ No change in a corporation which violates any of the substantial statutory conditions can bind a dissenting stockholder or compel him to submit to the new order of things.² In Connecticut the charter of a corporation having been amended by an act of the legislature on the question as to whether such amendment released subscribers from liability for their subscriptions, the court said: "Some amendments or laws affecting corporations are binding with or without their assent; others bind the corporation and every member thereof, if assented to by a majority of the stockholders; and others are not binding upon non-consenting members, although assented to by the majority. All general laws and mere matters of police regulation are embraced in the first class. Additional powers, duties, and privileges, which do not change essentially the nature and character of the corporation or the purpose for which it was created, and have for their object the promotion of the enterprise originally contemplated, fall within the second class. All amendments which work

Croswell, 5 Hill, 383; Ill. G. T. R. Co. v. Cook, 29 Ill. 237; Agr., etc., R.R. Co. v. Winchester, 13 Allen, 32; Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314; Peoria, etc., R.R. Co. v. Preston, 35 Iowa, 125; Hoey v. Henderson, 32 La. Ann. 1069; Noesen v. Port Washington, 37 Wis. 168; Ashton v. Burbank, 2 Dillon, 435; Charters R.R. Co. v. Hodgens, 77 Pa. St. 187; Caley v. Phila., etc., R.R. Co., 80 Id. 363; Southern Pa. R.R. Co. v. Stevens, 87 Id. 195; Bank v. Charlotte, 85 N. C. 433; Richmond Street R.R. Co. v. Reed, 83 Ind. 9; Zabriskie v. Hackensack, etc., R.R. Co., 18 N. J. Eq. 178; State v. Butler, 13 Lea, Tenn. 400.

¹ Dorris v. Sweeney, 60 N. Y. 467; s. c. 64 Barb. 636.

² Union Locks & Canals v. Towne, 1 N. H. 44; Banet v. Alton, etc., R.R. Co., 13 Ill. 504; Hartford, etc., R.R. Co. v. Croswell, 5 Hill, 383; Berry, etc., R.R. Co., 26 Ohio St. 673. To constitute a good defense to the payment of assessments, the subscriber must show affirmatively that he dissented from the alteration in a reasonable time. Martin v. Pensacola, etc., R.R. Co., 8 Fla. 370. See Pacific R.R. Co. v. Hughes, 22 Mo. 291; Miss., etc., R.R. Co. v. Cross, 20 Ark. 443.

a radical change in the nature and character of a corporation, or the purpose for which it was created, are within the third class. It is not easy to establish a general rule by which it may be seen at a glance to which class any given case belongs. Each case must in a measure depend upon its own circumstances.”¹

Where a subscription for the purpose of erecting an edifice for a medical college, the final instalment to be paid when the building was completed, it was held that a subscriber was not liable to pay the final instalment, for the reason that the building, before it was completed, was sold to another institution to be used for a different purpose, though the purchasers had completed the building.² The original charter of a railroad company provided that “should the company at any time desire any amendment to this act, it shall be lawful for the legislature to make the same.” It was held that this simply contemplated amendments that might facilitate the construction of the road, and not such as should in effect create a new company for a different undertaking.³ Subsequent to the granting of a charter to a railroad company, an act of the legislature authorized the company to assign to another corporation all the rights, powers, privileges, franchises, etc., held by it under its charter or by virtue of any other law, as well as its

¹ New Haven, etc., R.R. Co. v. Chapman, 38 Conn. 56. A promissory note given for shares in a homestead association about to be formed, the number of shares in the association being stipulated when the note is given, each share to represent a lot of land, does not fail for want of consideration because the association when formed has a different number of shares from that agreed upon, provided the land is the same and the lots are of the same value. But it will be otherwise if the price of each share is greater than was repre-

sented. Mahan v. Wood, 44 Cal. 462.

² Worcester Medical Inst. v. Bigelow, 6 Gray, 497. Signing a subscription paper in which the subscribers agree to pay the several sums affixed to their names “for erecting an academy,” does not render a party liable for the amount to an institution subsequently incorporated to erect such an academy. Phillips’ Limerick Academy v. Davis, 11 Mass. 113.

³ Bool v. Junction R.R. Co., 10 Ind. 93. See Charlotte Bank v. Charlotte, 85 N. C. 433.

stock, upon such terms and conditions as should be agreed upon by the board of directors, provided the act of the legislature should be accepted and approved by the stockholders representing a majority of stock subscribed at a meeting called for that purpose. It was held that a charter being, as between the State and the corporation, a contract within the meaning of the Constitution of the United States, the obligation of which it was not within the power of the legislature to destroy or impair, and the contract between the members of the corporate body and the corporation being equally within the prohibition of the constitution, the acceptance of the amendment to the charter was void for want of power on the part of a majority of the stockholders to vote it.¹ An act consolidating two or more corporations into one, with a proviso that "This act shall not affect the legal rights of any person, and shall not take effect until it shall be accepted by the members of said corporations respectively," creates a new corporation, and a member of one of the old corporations is not a member of the new, unless he expressly assents to becoming such.² A. by his note promised to

¹ New Orleans, etc., R.R. Co. v. Harris, 27 Miss. 517. See Kean v. Johnston, 1 Stockt. N. J. 401. The charter of a railroad company authorized the county commissioners of a county, through which the road passed, to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted that this should be done. The election being held, it was voted that the subscription should be made. But before a subscription, the State adopted a new constitution, one of the articles of which prohibited such subscriptions. It was held that the provision of the charter authorizing commissioners to subscribe, conferred a power upon a civil institution of government which could be

modified, changed, enlarged, or restrained by legislative authority, the charter not importing a contract within the meaning of the Constitution of the United States, and that the mere vote to subscribe did not of itself form such a contract with the railroad company. Aspinwall v. Davies County, 22 How. 364. See County of Callaway v. Foster, 98 U. S. 567.

² Hamilton Ins. Co. v. Hobart, 2 Gray, 543. See State v. Bailey, 16 Ind. 46; Shelbyville, etc., Turnp. Co. v. Barnes, 42 Id. 498; International, etc., R.R. Co. v. Bremond, 53 Texas, 96; Terhune v. Midland R.R. Co., 38 N. J. Eq. (11 Stewart) 423. When the consolidation of companies is not made in

pay a railroad company a specified sum in consideration that it would locate its depot in a particular place, payment to be made when the company should begin to build the depot. The company subsequently obtained an amendment to its charter, dividing its line of road between two companies. It was held that by the alteration of the charter and its acceptance, the company became substantially a new and different corporation, which could not perform the condition upon which the note was given.¹ Change of the amount of capital stock after a subscription without the subscriber's assent or subsequent acquiescence, will discharge him from all liability on account of his subscription.² A subscription paper provided that whereas a

compliance with the statute, and consequently without authority of law, a subscriber to the stock of one of the companies so attempting to consolidate can insist upon the illegality of the consolidation in a suit brought by the alleged consolidated company. Mansfield, etc., R.R. Co. v. Stout, 26 Ohio St. 241.

¹ Carlisle v. Terre Haute, etc., R.R. Co., 6 Ind. 316.

² Hughes v. Antietam Manf. Co., 34 Md. 316; Macedon, etc., P. R. Co. v. Lapham, 18 Barb. 312; Wood v. Dummer, 3 Mason, 308; Merchants' Bank v. New York, etc., R.R. Co., 13 N. Y. 599; New York, etc., R.R. Co. v. Schuyler, 34 Id. 30; Sutherland v. Olcott, 95 Id. 93; *In re* Financial Corp., L. R. 2, Ch. App. 714. See Bridgeport Bank v. New York, etc., R.R. Co., 30 Conn. 231; Payson v. Stoever, 2 Dillon, 428; Curry v. Scott, 54 Pa. St. 270; Knowlton v. Congress, etc., Spring Co., 14 Blatchf. 364; Salem Mill Dam Co. v. Ropes, 6 Pick. 23; Droitwich Salt Co. v. Curzon, L. R. 3, Exch. 42; Smith v. Goldworthy, 4 Q. B. 430; Rollins v. Clay, 33 Me. 132; Bank Comrs. v. Bank of Brest, 1 Harrington Ch. 106.

The officers, directors, and stockholders of a corporation cannot, even by unanimous agreement made under an honest misapprehension of their powers, increase the capital stock, or give to the corporation any increased power beyond that conferred upon it by law; and such unauthorized acts would be cause to cancel the charter. People v. Parker Vein Coal Co., 10 How. Pr. 543. An attempt to increase it beyond the limit fixed by the charter would be *ultra vires*, and the increased stock itself void. The contract of the holder of such unauthorized stock to pay for it would be without consideration, and could not be enforced, and he would not be estopped to set up the nullity of the stock in an action against him by creditors by the fact that he attended the meetings at which the increase of the stock was voted for, received certificates for the stock, and after such increase the company by its agents held itself out as possessing the enlarged capital, and invited and obtained credit on the faith of such representations. Scoville v. Thayer, 105 U. S. 143. A distinction is made between shares which the corporation has no

company had been incorporated the capital stock of which had been fixed at fifty thousand dollars, the undersigned associated themselves to form the corporation and severally subscribed for and agreed, each with the other, and with the corporation, to take the number of shares affixed to their respective names, and to pay therefor the sum of one hundred dollars a share, at such times as should be determined upon for the organization of the corporation. The defendant subscribed for ten shares. After subscriptions to the capital stock to an amount exceeding fifty thousand dollars had been obtained, a meeting was called for the purpose of organization, which appointed a committee "to report the names of subscribers to the original amount of capital stock of fifty thousand dollars"; and the committee reported a list of persons who had subscribed, which list did not include the defendant. It was held that the fact that the meeting voted to increase the capital stock to one hundred thousand dollars, and also that "all subscribers be now admitted to the company with the rights and privileges of stockholders under the agreement," did not create any liability on the part of the defendant; and that it was not material to inquire whether those votes, if known to the defendant, taken in connection with his subsequent payment of the first three assess-

power to issue, and those which it has power to issue, although not in the manner in which or upon the terms they have been issued. A stockholder cannot set up informalities in the issue of stock authorized by law, but is estopped by his acts and acquiescence. *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 Id. 665; *Pullman v. Upton*, 96 Id. 328; *Lindley on Partnership*, 138. See *Lathrop v. Kneeland*, 46 Barb. 432; *Mackley's Case*, 1 Ch. D. 247; *Merrill v. Gamble*, 46 Iowa, 615; *Same v. Beaver*, Ib. 646.

Where the abstract power to increase the capital stock of a corporation exists, and the creditors can, without fault, believe that the increase has been lawfully effected, the doctrine of estoppel may apply, and the increased stock, though illegal, be deemed valid as against the creditors who have acted upon the faith of such increase. *Eaton v. Aspinwall*, 19 N. Y. 119; *Aspinwall v. Sacchi*, 57 Id. 331; *Kent v. Quicksilver M. Co.*, 78 Id. 159; *Sheldon H. B. Co. v. Eickmeyer, etc., Co.*, 90 Id. 607; *Veeder v. Mudgett*, 95 Id. 295.

ments, would be sufficient evidence of a new agreement on his part to take ten shares in the corporation with the enlarged capital, such an agreement not having been declared on by the plaintiff.¹ Notwithstanding the charter provides that the capital stock may be increased from time to time at the pleasure of the corporation, the directors alone cannot, without submitting their action to the stockholders for approval, increase the capital stock. A clause in the charter that "all the corporate powers shall be vested in and exercised by the board of directors," refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. "Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the consent of the members."² Where the act incorporating

¹ Katama Land Co. v. Jarnegan, 126 Mass. 155. See Same v. Holley, 129 Mass. 540.

² Railway Co. v. Allerton, 18 Wall. 233, per BRADLEY, J.; Eidman v. Bowman, 58 Ill. 444; Finley Shoe Co. v. Kurtz, 34 Mich. 89; Gill v. Balis, 72 Mo. 424. The regulations in the charter of a corporation touching the increase of capital stock, supersede contracts and govern in making such increase. Where the charter provided that the directors should make by-laws for the management and disposition of the stock, and should have power to increase it to \$200,000, on such terms and conditions and in such manner as to them should seem best, it was held that this provision was inconsistent with a proposition that the existing stockholders should have the exclusive right to take the increased stock in amounts proportionate to the original

stock held by them. Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, disapproving Gay v. Portland Bank, 3 Mass. 364. The right to the remainder of the stock, when it is issued, vests in the original shareholders in proportion to the amount each holds of the original stock, if they will pay for it. A stockholder may waive this right, but if he does not, and is deprived of it, he may sue the corporation and recover the loss. The measure of damages will be the excess of the market value of the stock above the par value at the time of payment of the last instalment, with interest on the excess. Eidman v. Bowman, *supra*; Matter of Wheeler, 2 Abb. Pr. N. S. 361; State v. Smith, 48 Vt. 266. In order to maintain an action, there must be proof of an offer to subscribe, and a demand. Wilson v. Bank of Montgomery County, 29 Pa. St. 537. "A corporation may issue

a railroad company fixes the route on which the road is to be located, the location thus established enters into and forms a material part of the consideration for subscriptions to the stock, and the abandonment of the prescribed route by the company and the adoption of an entirely different one, will release those who have previously subscribed, and who have not consented to the alteration.¹ The same is true of plank road and turnpike companies.²

When a railroad company, after a subscription to its stock, procures an amendment of its charter changing one of the termini of the road without the consent of a subscriber and against his wishes, he is released from his obligation to pay.³ Where the *termini* of a railroad are fixed by its charter, the franchise granted to the company is territorial; and an extension of the termini is necessarily an extension of the franchise. It is in effect the creation, in

new shares, and give them a preference as a mode of borrowing money, where it has power to borrow on bond and mortgage; as preferred stock is only a form of mortgage." WOODWARD, J., in Westchester & Phila. R.R. Co. v. Jackson, 77 Pa. St. 321, referring to Everhart v. R.R. Co., 28 Id. 353; Redf. on Railw., sec. 237. A corporation cannot, under the guise of a purchase of property, effect a fictitious increase of stock. Ewing v. Oroville M. Co., 56 Cal. 649.

¹ Hester v. Memphis, etc., R.R. Co., 32 Miss. 378; Champion v. Memphis, etc., R.R. Co., 35 Id. 60; Witter v. Miss., etc., R.R. Co., 20 Ark. 463; Winter v. Muscogee R.R. Co., 11 Ga. 438; Buffalo, etc., R.R. Co. v. Pottle, 23 Barb. 21. Where the condition of a subscription to a railroad company was that the road should be "located within twenty miles of St. Omer," it was held that if the company abandoned that route, and located the road on another and entirely different one,

the subscriber was entitled to rescind the contract, and to recover from the company what he had paid. Jewett v. Lawrenceburgh, etc., R.R. Co., 10 Ind. 539. See Fremont Ferry, etc., Co. v. Fuhrman, 8 Neb. 99. Every deviation from the prescribed route will not thus absolve non-consenting subscribers, the question in each case being determined by the circumstances. See Rutland, etc., R.R. Co. v. Thrall, 35 Vt. 536; Danbury, etc., R.R. Co. v. Wilson, 22 Conn. 435; Del. R.R. Co. v. Tharp, 1 Houston, 149.

² Rives v. Plank R. Co., 30 Ala. 92; Middlesex Turnp. Co. v. Swan, 10 Mass. 384. See Cent. Pl. R. Co. v. Clemens, 16 Mo. 359.

³ Thompson v. Guion, 5 Jones Eq. 113; N. C. R.R. Co. v. Leach, 4 Jones, 340; Marietta, etc., R.R. Co. v. Elliott, 10 Ohio St. 457; Winter v. Muscogee R.R. Co., 11 Ga. 438; Hartford, etc., R.R. Co. v. Croswell, 5 Hill, 383. *Contra:* Garrett v. Dillsburg, etc., R.R. Co., 78 Pa. St. 465.

a summary manner, of a new corporation. In such a case the majority cannot bind the minority; nor can the company compel a stockholder to dispose of his stock by paying him back the amount he has paid for it with interest from the date of payment, and indemnifying him against all loss.¹

A plank road company obtained an act of the legislature authorizing it to stop short, in making its road, of the terminus named in its charter. It was held that if the company availed itself of this permission, it could not enforce the payment of subscriptions.² An act authorized the incorporation of a company for the purpose of making a turnpike road between specified termini. Subsequently the legislature divided the route between two companies, and attempted to apportion subscriptions which had been made to the first company between the two. It was held that the latter act was unconstitutional, and that payment of original subscriptions was optional with subscribers.³

A municipal subscription to the stock of a railroad company which has previously released its private subscribers is not valid, and a rescission of the contract will be decreed on a bill filed for that purpose.⁴

§ 191. When subscriber not released by change.—The mere passage of an amendment, unless the corporation adopts and proceeds to act under it, does not operate *per se* to exonerate a stockholder from liability to pay his subscription,⁵ nor immaterial alterations of the charter, such as changing the name of the corporation.⁶ A subscriber to a

¹ Stevens v. Rutland, etc., R.R. Co., 29 Vt. 545; Hartford, etc., R.R. Co. v. Croswell, *supra*; Livingstone v. Lynch, 4 Johns. Ch. 573. etc., R.R. Co., 32 Pa. St. 141. See Mercer County v. Pittsburg, etc., R.R. Co., 27 Id. 389; McCully v. Pittsburg, etc., R.R. Co., 32 Id. 225.

² Manheim P. R. Co. v. Arndt, 31 Pa. St. 317.

³ Turnpike Co. v. Phillips, 2 Pen. & W. 184.

⁴ County of Crawford v. Pittsburgh, 12 Wis. 340; Racine County Bank v.

⁵ Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314; Hawkins v. Miss., etc., R.R. Co., 35 Miss. 688.

⁶ Milwaukee, etc., R.R. Co. v. Field, 12 Wis. 340; Racine County Bank v.

prospectus for a company to be formed will be liable on his subscription if the organization of the company is afterward perfected, even though the charter obtained for the company differs somewhat from the prospectus, so long as the company organized is identical with the one described in the prospectus.¹ Amendments of the charter, which are general laws and mere matters of police regulation affecting corporations, are binding with or without their consent.²

Modifications and improvements in the charter useful to the public, beneficial to the corporation, and in accordance with what was the understanding of the subscribers as to the real object to be effected, such as the issuing of preferred stock for the purpose of raising funds to complete a railroad, borrowing money, mortgaging the road, extending the main line, building branches, and adding facilities for crossing rivers by ferries, in no sense change the character of the enterprise, and do not impair the contract of

Ayres, Ib. 512; Bucksport, etc., R.R. Co. v. Buck, 68 Me. 81; Clark v. Monongahela Nav. Co., 10 Watts, 364; Buffalo, etc., R.R. Co. v. Dudley, 14 N. Y. 336; Poughkeepsie, etc., P. R. Co. v. Griffin, 24 Id. 150, reversing S. C. 21 Barb. 454; Delaware, etc., R.R. Co. v. Irick, 3 Zab. 321. The mere mismanagement of the affairs of a corporation does not release stockholders from their obligations to the company. Chetlain v. L. Ins. Co., 86 Ill. 220. The abandonment of the construction of the improvement does not of itself constitute a defense to an action to recover a debt due the corporation. Hardy v. Merriweather, 14 Ind. 203. Representations made by an agent soliciting subscriptions to the stock of a railroad company that the company has sufficient means to construct the road without obtaining subscriptions along the line of it, are mere expressions

of opinion, and not sufficient to release a subscriber from liability. And so also with regard to a representation that the road will be completed within a given time. The entire consideration for a subscription is the stock subscribed, and the fact that the road has been abandoned, furnishes no defense against creditors of the corporation, even after the corporate existence has ceased. Bish v. Bradford, 17 Ind. 490. See Dorman v. Jacksonville, etc., P. R. Co., 7 Fla. 263.

¹ Midland, etc., R.R. Co. v. Gordon, 16 Mees. & Welsb. 804. In this case the charter provided for the termination of a railroad short of the terminus named in the prospectus, and authorized the company to purchase a canal for the remaining distance.

² New Haven, etc., R.R. Co. v. Chapman, 38 Conn. 56.

subscription, even though the exercise of the increased right may bring upon the corporation an expense not originally contemplated.¹ The mere acceptance by a railroad company of an amendment of its charter authorizing it to construct a branch road not alluded to in the original charter, and authorizing an increase of the capital stock for that purpose, with a proviso that no part of the stock subscribed prior to the passage of the act shall be applied to the construction of such branch, will not be a ground for releasing a subscriber to the original stock who has not given his assent to the amendment.² Where a corporation transcends its legitimate powers in incurring an obligation, a stockholder cannot be exonerated from his statutory responsibility by the mere fact that he individually protested against the transaction. If he does not sell out or abandon his membership before the consummation of the transaction, and it is lawful, the legal consequences attach to him.³ The alteration of a railroad charter authorizing a

¹ *Gray v. Monongahela Nav. Co.*, 2 Watts & Serg. 156; *Turnpike Co. v. Phillips*, *supra*; *Everhart v. Phila., etc., R.R. Co.*, 28 Pa. St. 339; *Clark v. Monongahela Co.*, 10 Watts, 364; *Peoria, etc., R.R. Co. v. Elting*, 17 Ill. 429; *Peoria, etc., R.R. Co. v. Preston*, 35 Iowa, 115. See *Central P. R. Co. v. Clemens*, 16 Mo. 359. Where there is nothing in the terms of the charter or the subscription that prohibits the pledging or mortgaging of the capital to secure further loans, the issuing of preferred stock does not release a subscriber to the original stock from liability on his subscription, it being only a form of mortgage. *Rutland R.R. Co. v. Thrall*, 35 Vt. 536. The fact that a part of the building erected by a hotel company is arranged and leased for stores, does not release a stockholder from his liability to pay instalments on his shares. *City Hotel v. Dickinson*, 6 Gray, 586. Where a

contractor agrees to take part pay in stock of a corporation for which the work is to be done, it is no excuse for refusing to receive stock in such payment that the corporation procured from the legislature an alteration of its charter by which the stock of the corporation is increased; nor is the corporation obliged to make him a tender of the stock on a day certain, though the agreement is that it is to be paid within a specified number of days from the completion of the work. *Moore v. Hudson River R.R. Co.*, 12 Barb. 156.

² *Hawkins v. Miss., etc., R.R. Co.*, 35 Miss. 688; *New Orleans, etc., R.R. Co. v. Harris*, 27 Id. 517.

³ *Sumner v. Marcy*, 3 Woodb. & Minot, 105. See *Hannibal, etc., P. R. Co. v. Menefee*, 25 Mo. 547; *Miss., etc., R.R. Co. v. Cross*, 20 Ark. 443; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220.

change in the location of the road, if consistent with the original design and object of the enterprise, not materially varying the route nor abandoning a terminus established at the time of subscription, will not release a subscriber, though made without his consent.¹ Although in a suit against a subscriber to enforce the collection of assessments by a new company formed by consolidation with the one with which the subscriber contracted, he may question the validity of the consolidation proceedings notwithstanding such proceedings were sufficient to make the new company a corporation *de facto*.² Yet subscriptions to the stock of a railroad company made after the passing of an act authorizing its consolidation with another company will not be dis-

¹ Wilson v. Wills Valley R.R. Co., 33 Ga. 466. See Fall River, etc., Co. v. Old Colony, etc., R.R. Co., 5 Allen, 221; Hentz v. Long Island R.R. Co., 13 Barb. 646; Walker v. Mad River, etc., R.R. Co., 8 Ohio, 38; Cleveland, etc., R.R. Co. v. Speer, 56 Pa. St. 325; Southern, etc., R.R. Co. v. Stoddard, 6 Mian. 150. In the articles of association filed for the incorporation of a railroad company it was stated that the road was to be constructed, maintained, and operated from the city of B. to a point on the State line between New York and Pennsylvania. The road was built from B. to J., but the twelve remaining miles of the line designated were not constructed. There was no proof that this section of the line was abandoned by the company, but only that the company stopped the construction of its road at J. It was held that a subscriber was not released by the omission of the company to construct its road to the State line. Buffalo & Jamestown R.R. Co. v. Gifford, 87 N.Y. 294. Although, as a general rule, a subscriber to the stock of a corporation is released from his obligation to pay his subscription by a fundamental

alteration of the charter. Yet it has been determined in a multitude of cases, both English and American, that a subscriber is not released from his engagement to take and pay for stock by any alteration which at the time the subscription was made was authorized either by a general law, or by the charter of the corporation. See Cork, etc., R.R. Co. v. Paterson, 37 Eng. L. & Eq. 398; Nixon v. Brownlow and Nixon v. Green, 3 Hurl. & Norm. 186; Bish v. Johnson, 21 Ind. 299; Nugent v. Supervisors, 19 Wall. 241; Northern R.R. Co. v. Miller, 10 Barb. 260; Troy, etc., R.R. Co. v. Kerr, 17 Id. 581. Where the charter of a railroad company gave the directors power to change the route of the road whenever a cheaper or better route could be had, the fact that the change was made for one or both of these reasons, will not release a subscriber, notwithstanding the private interests or property of some of the subscribers will be injured thereby. Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314.

² Tuttle v. Mich. Air Line R.R. Co., 35 Mich. 247.

charged or invalidated by the subsequent consolidation under the act, the subscription being deemed to have been made with reference to the authority conferred.¹ A preliminary injunction by a court of competent jurisdiction suspending the prosecution of the work until the further order of the court, will not defeat an action brought by the corporation for the recovery of a subscription.² The fact

¹ Sparrow v. Evansville, etc., R.R. Co., 7 Ind. 369; Fisher v. The same, Ib. 407; Bish v. Johnson, 21 Ind. 299. In Illinois it was held that an amendment of the charter of a railroad company authorizing the company to unite or consolidate its road with any other road which it might intersect, and dispensing with the obligation to build the road beyond the point of intersection, would not excuse a stockholder from paying his subscription. The court said: "In determining the question as to how far the original purposes of a corporation may be departed from after subscriptions have been made to its stock, without violating the rights of the stockholders individually, we must first consider with what intention, and in view of what advantages the law must presume such subscriptions were made. The conclusive presumption is that it was with a view to the profits to be derived from the stocks thus subscribed as an investment, and not in reference to any incidental advantages which may accrue to the stockholders by reason of the construction of the improvement in consequence of any anticipated enhancement of any other property which the stockholder may own or otherwise." Sprague v. Ill. River R.R. Co., 19 Ill. 174. See Banet v. Alton & Sangamon R.R. Co., 13 Id. 504; Rice v. Rock Island, etc., R.R. Co., 21 Id. 93.

² Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69. A court of equity

has jurisdiction to restrain the directors of a corporation from doing acts which will amount to a violation of the charter, or to prevent a misapplication of the capital or profits, if the acts intended to be done will constitute a breach of trust. And the jurisdiction extends to inquire into and to enjoin any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. Dodge v. Woolsey, 18 How. 331. On a bill filed by a stockholder in a plank road company to restrain the commission of certain acts by the company, alleged to be prejudicial to the interests of the complainant as a stockholder, it was held that the occupation of a part of an ancient highway on which the plank road was constructed by a railroad with the consent of the plank road company, without the personal consent of the complainant, the plank road company having been authorized by the legislature to lay rails upon their road, was not a violation of the rights of the complainant; that the sale by the plank road company of the whole or a part of its road to the railroad company without the personal consent of the complainant, was not such an infringement (if any) of the complainant's rights as a stockholder as the court would restrain by injunction; and that

that some of the stockholders of a railroad company do not, at the time of subscribing, pay the sum per share required by law, does not invalidate the charter.¹ An attempt by a railroad company to lease its road or give up its management to another company without the authority of the legislature, though a breach of duty on the part of the directors, would not discharge the subscribers from their liability to pay for their stock.² The assent of stockholders to amendments changing or extending the objects, increasing the powers, or enlarging the liabilities of the corporation in any matter fundamental, is not to be presumed, but must be proved, each case being considered and decided upon its own circumstances.³ The charter of a railroad company provided that whenever two hundred thousand dollars worth or more of the capital stock was subscribed, persons named might call the first meeting of the stockholders, to choose directors, and perfect the organization of the corporation; and the subscription-book was headed with a resolution that no assessment should be laid upon the stock subscribed of more than three per cent. until the whole amount of stock necessary for the completion of the road had been subscribed. It was held that the resolution was

a change of the route of the plank road by authority of the legislature at the instance of the plank road company, was not a fundamental change of the objects of the company, nor a fundamental alteration of its structure which equity would restrain at the instance of a stockholder. *Story v. Jersey City, etc., Plank Road Co.*, 16 N. J. Eq. (1 C. E. Green) 13. Where a corporation sues a stockholder for calls upon his subscription, the corporation cannot be restrained by injunction from the collection of the amount on the ground of a departure from its charter in reference to matters not connected with the suit. *Booker, ex parte*, 18 Ark. 338.

¹ *Com. v. Westchester R.R. Co.*, 3

Grant Pa. 200; *Hibernia T. Co. v. Henderson*, 8 Serg. & Rawle, 219; *Centre T. Co. v. McCurdy*, 16 Id. 140; *Clark v. Monongahela Nav. Co.*, 10 Watts, 364.

² *Troy, etc., R.R. Co. v. Kerr*, 17 Barb. 581.

³ *March v. Eastern R.R. Co.*, 43 N. H. 515; *Union Locks & Canals*, 1 Id. 44. A stockholder in a railroad company who seeks to avoid payment on the ground that one of the termini was materially changed from that designated in the charter, must show that the alteration was made without his concurrence or consent. *North Carolina R.R. Co. v. Leach*, 4 Jones N. C. 340.

valid, although it imposed a condition which was not in the charter, it being simply a declaration to which all of the subscribers were parties.¹ An act directed that subscriptions to the amount of \$150,000 should be made to the capital stock before corporate authority should be exercised. After the defendant had subscribed an act was passed reducing the amount of subscriptions required to \$25,000. It was held that the defendant, after voting at the organization of the corporation and the election of directors, could not escape liability on his subscription.²

A subscriber to the stock of a railroad company cannot show by parol that he would not have subscribed if he had not supposed, from representations of the agents of the company, that the road would have followed a different route. The subscription being absolute on its face, verbal proof of such facts will not be allowed to bar the action, and representations of that character will be deemed mere expressions of opinion.³

§ 192. General rule as to subscription obtained by fraud.—When representations made by the agent of a corporation to obtain subscriptions are a part of a scheme of fraud participated in by its officers; or where they are such as the agent may reasonably be presumed by the subscriber to have the authority of the corporation to make, they may be given in evidence to show the fraud by which the subscription was procured.⁴ Where written proposals for a

¹ Ridgefield, etc., R.R. Co. v. Brush, 43 Conn. 86. See Kansas City Hotel Co. v. Harris, 51 Mo. 464.

² Bedford R.R. Co. v. Bowser, 48 Pa. St. 29; Central, etc., Turnp. Co. v. McConaby, 11 Serg. & Rawle, 140.

³ Eakright v. Logansport, etc., R.R. Co., 13 Ind. 404; La Grange, etc., P. R. Co. v. Mays, 29 Mo. 64; Martin v. Pensacola, etc., R.R. Co., 8 Fla. 370.

⁴ Custar v. Titusville Gas, etc., Co., 63 Pa. St. 381; Jewett v. Valley R.R. Co., 34 Ohio St. 601; Fisk v. Chicago, etc., R.R. Co., 4 Abb. Pr. N. S. 378; N. Y. Exchange v. De Wolf, 31 N. Y. 271; Montgomery, etc., R.R. Co. v. Matthews, 77 Ala. 357; New Orleans, etc., R.R. Co. v. Williams, 16 La. Ann. 315; Hester v. Memphis, etc., Co., 32 Miss. 378; Upton v. Tribilcock, 91 U. S. 45; Davis v. Dumont, 37 Iowa, 47; Atlanta, etc., R.R. Co. v. Hodnett, 36 Ga. 669;

sale of stock by a corporation are false in any material respect by which the purchasers are misled to their injury, the sale is void whether the vendor knew that the representations were false or not; and the suppression from the written proposals of any fact in the knowledge of the vendor materially affecting the value of the stock and inconsistent with the statements as made, vitiates the contract, if the purchasers are thereby injured. It is the same when the sale is made by an agent who makes false representations in relation to the value and condition of the property, although the owner neither authorized nor had knowledge of them. But the president of a corporation is not *ex officio* an agent to sell, unless specially appointed, and his representations will not therefore bind the corporation.¹

Evidence is admissible to prove that a subscription was unfairly or fraudulently obtained, the same as in the case

La Grange P. R. Co. v. Mays, 20 Mo. 64; Miller v. Wild Cat, etc., Co., 57 Ind. 241; McClellan v. Scott, 24 Wis. 81; Water Valley Manf. Co. v. Seaman, 53 Miss. 65. See Vicksburg, etc., R.R. Co. v. McKean, 12 La. Ann. 638; First Nat. Bank v. Hurford, 29 Iowa, 579; Buffalo, etc., R.R. Co. v. Dudley, 14 N.Y. 336; Smith v. Tallahassee, etc., R.R. Co., 30 Ala. 650. If a corporation has stock at its own disposal, and its agent, who has full power to sell it in the market, issues the proper certificates for it, any person dealing with him in good faith and paying value, becomes entitled to all the rights and privileges of a stockholder, although the agent by a secret fraud intended the transaction to be for his own benefit, and used the funds he received for his private purposes. Mechanics' Bank v. New York, etc., R.R. Co., 13 N. Y. (3 Kernan) 599; 4 Duer, 480.

¹ Crump v. United States Mining

Co., 7 Gratt. 352. In an action brought by a plank road company to recover of the defendant the balance on his subscription for stock in the company, it was held competent for the defendant to prove that the president of the board of directors, and one of the directors, both being stockholders, represented to him before he subscribed to the stock of the company, that the road would be located in a manner highly favorable to his interests, which was not done. WALKER, J., dissenting, held that the alleged representations were not admissible, unless they were made in the prosecution of the business of the corporation, or unless the president and director acted for the corporation in taking the subscription which was accepted by the corporation with knowledge that it was procured by false representations. Rives v. Montgomery South Plank R. Co., 30 Ala. 92.

of any other contract.¹ "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like the contracts between two individuals. If one man makes a false statement which misleads another, the way in which it is to be treated, affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual."² In the case in which Lord ROMILLY made the foregoing remarks, a subscriber to the stock of a railroad company filed a bill for the removal of his name from the list of stockholders, and for the return of payments he had made on account of calls. He was induced to subscribe by a prospectus which referred to a concession made by the government of Venezuela to the company, and stated that the contractor had guaranteed a dividend of two and a half per cent. on the paid-up capital during the construction of the work, while in reality the guarantee was limited to £20,000, and that the contract had been entered into "at a price considerably within the available capital," when, in fact, as the company had paid £50,000 for the concession, which payment was not mentioned in the prospectus, there was only a margin left of £30,000 out of £500,000. The relief prayed for was granted on the ground of mis-

¹ Middlebury College v. Loomis, 1 Vt. 189; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 190; Ross v. Estates Investment Co., L. R. 3, Ch. 682; Reese River Mining Co. v. Smith, L. R. 4, H. L. 64; Oakes v. Turquand, L. R. 2, H. L. 325, 344; Western Bank of Scotland v. Addie, L. R. 1, H. L. 145; Upton v. Englehart, 3 Dillon, 496. Four individuals obtained a charter for a company, with a capital of £20,000, to be divided into 400 shares. Before any other persons had subscribed to the stock the four original members divided the 400 shares between them, account-

ing to the corporation for only £12,000, and afterward sold their shares. A bill having been filed by the corporation against them impeaching the transaction, it was held that though at the time they were the only persons interested in the company, yet it was not competent for them to take the shares without paying the full consideration. Soc. of Practical Knowledge v. Abbott, 2 Beavan, 559.

² Cent. R.R. Co. of Venezuela v. Kisch, L. R. 2, H. L. 99. See New Brunswick, etc., R.R. Co. v. Muggeridge, 1 Drew & Sm. 381.

representation and concealment. Fraudulent representations as to the pecuniary condition of a railroad company and its past earnings, made by its officers and other persons while employed by it in soliciting subscriptions to its stock, will be regarded as made by them in the execution of their agency, and will constitute a cause of action to set aside conveyances of land, alleged to have been made under such inducements, in exchange for the stock of the company.¹ Where a note secured by mortgage is procured to be made to a railroad company for stock subscribed by the maker, by means of false and fraudulent representations made by the officers of the company as to its financial condition, and as to the value of the stock and the dividends it will earn, the fraud will constitute a defense to the collection of the note by the company or by one to whom the note is assigned after maturity.² When a county is authorized by the legislature to subscribe for

¹ Waldo v. Chicago, etc., R.R. Co., 14 Wis. 575. Where a party is induced, by false representations as to the solvency of a corporation, to purchase some of its stock, and, as soon as he is informed of the fraud, repudiates the transaction, he can recover in an action in which he claims that the vendor be compelled to refund the amount paid. Instructions to the jury that it was for them to determine whether the false representations were made by the defendant, and whether the plaintiff was influenced by them in making the purchase, were sustained on appeal. Bradley v. Poole, 98 Mass. 169. Fraudulent representations by a railroad company, through its officers or agents, as to its pecuniary condition, are ground for avoiding a contract of sale of land obtained thereby, even though the indebtedness was secured by a mortgage upon a portion of the company's property; and where one of the statements was that

certain harbor and depot property of the company was worth three times its actual value, it was held that this must be treated not as a mere matter of opinion, but as a fraudulent representation. McClellan v. Scott, 24 Wis. 81. At a public meeting held for the purpose of procuring from land-owners the right of way for a railroad, speeches were made by agents of the company, stating what it would do in relation to crossings, bridges, etc., and a land-owner, acting on these representations, conveyed to the company, without any pecuniary consideration, the right of way through his land. It was held admissible to show, as a ground for cancelling the deed for fraud, the inducements held out at the meeting by the public speakers, and the refusal of the company to comply with the promises there made. Atlanta, etc., R.R. Co. v. Hodnett, 36 Ga. 669.

² Melendy v. Keen, 89 Ill. 395.

stock in a railroad company which appears to have individual subscribers, and it is subsequently discovered that there are none in fact, the bonds of the county given in payment of the subscription will be ordered to be returned and cancelled.¹

A contract to take shares induced by fraudulent representations or concealment is not void, but voidable; that is, it is valid until disaffirmed. In order to avoid the contract of subscription, it must appear to have been made upon the faith of false representations of the agent in relation to some matter of fact material to the value and success of the enterprise.² A false representation with reference to the provisions of the charter or articles of association, or the legal effect of the subscription, would not render the contract voidable.³ That a person was induced to subscribe for stock by representations made by the agent of the company as to the liability incurred by subscribing, which statement proved to be incorrect, would not release the subscriber.⁴ A party is presumed to know the contents of the instrument he signs, and has therefore no right to rely upon the statement of the other party as to its legal effect. The verbal statement of the agent that the defendant's signature would not be binding unless he attended the meeting and signed his name to the stock-books, must be held a mere representation as to the legal effect of the subscription, and, though false, it could not deceive the defendant, because the agreement to which he then subscribed his name binds him absolutely to pay.⁵ Where, however, one acting in behalf of a corporation in-

¹ *Mercer County v. Pittsburg, etc., Ellison v. Mobile, etc., R.R. Co., 36 R.R. Co., 27 Pa. St. 389.* ² *Hughes v. Antietam Manf. Co., 34 Md. 316; Oregon Cent. R.R. Co. v. Missouri Home Ins. Co., 46 Mo. 248.* ³ *Greenville, etc., R.R. Co. v. Smith, 6 Rich. 91; N. E. R.R. Co. v. Rodriguez, 10 Id. 278.* ⁴ *New Albany, etc., R.R. Co. v. Fields, 10 Ind. 187.* ⁵ *Parker v. Thomas, 19 Ind. 213;*

¹ *Mercer County v. Pittsburg, etc., Ellison v. Mobile, etc., R.R. Co., 36 R.R. Co., 27 Pa. St. 389.* ² *Hughes v. Antietam Manf. Co., 34 Md. 316; Oregon Cent. R.R. Co. v. Missouri Home Ins. Co., 46 Mo. 248.* ³ *Greenville, etc., R.R. Co. v. Smith, 6 Rich. 91; N. E. R.R. Co. v. Rodriguez, 10 Id. 278.* ⁴ *New Albany, etc., R.R. Co. v. Fields, 10 Ind. 187.* ⁵ *Parker v. Thomas, 19 Ind. 213;*

duces a party who can neither read nor write to execute an agreement for subscription, and the agent signs the party's name to the agreement, he must so sign in the principal's presence, and such signing will not prevent the party from setting up misrepresentations and fraud of the person procuring his signature in avoidance of the contract.¹ If subscription to stock is fraudulently obtained, the subscriber will have a good defense though his name be entered on the books of the corporation, unless in consequence of his failure to notify the corporation in a reasonable time after he discovers the fraud, it will sustain an injury by his release.² "Misleading facts of any description, material to the contract to take shares, and actually the inducement to such contract, render such contract voidable on the part of the person so induced to enter into the same, always providing that the misleading facts in question were promulgated by the company itself, or its duly authorized agents."³

§ 193. Where the subscriber is a party to the fraud.—A person will not be relieved of his subscription on the ground that it was induced by false and fraudulent representations when he is a *particeps criminis*, or has not been vigilant in discovering the fraud and in repudiating the contract; or where the representation of the agent is so opposed to the interests and duty of the corporation that it cannot be reasonably presumed he was authorized to make it.⁴

¹ Rockford, etc., R.R. Co. v. Schunick, 65 Ill. 223; Wert v. Crawfordsville R.R. Co., 19 Ind. 242. Where a note is given in payment of a conditional subscription upon the false representation of an agent of the corporation that the condition has been performed, the note is void. Taylor v. Fletcher, 15 Ind. 80.

² Cunningham v. Edgefield, etc., R.R. Co., 2 Head. Tenn. 23.

³ Green's Brice's Ultra Vires, 2d Am. Ed. 348, referring to Froud's Case, 30 L. J. Ch. 322; Burnes v. Pennel, 2 H. L. 497.

⁴ Blodgett v. Morrill, 20 Vt. 509; Ogilvie v. Knox Ins. Co., 22 How. 380; Upton v. Hansbrough, 3 Biss. 417; Perkins v. Savage, 15 Wend. 412; Graff v. Pittsburg, etc., R.R. Co., 31 Pa. St. 489; Southern Plank R. Co. v. Hixon, 5 Ind. 166; Litchfield Bank v. Church,

A secret understanding between an agent of a corporation and a subscriber to the stock, to the effect that the subscription of the latter is to be merely colorable, is a fraud upon the other subscribers, and the terms of the written subscription will be enforced.¹ The defendant introduced in evidence a written secret agreement between the directors of a corporation and himself as a subscriber for shares in its capital stock, to the effect that he might within a specified time reduce the number of shares he had taken, the subscription to be held out as *bona fide* and for the full amount, in order to induce others to subscribe. It was held that the original subscription could be enforced, although if its conditional character had appeared upon the books of the corporation no one would have been deceived, and the contract might have been valid.² Where a party was induced to sign a subscription by the assurance of the agent that he wanted the signature to influence others to sign, and that the party should never be called upon to pay, it was held that he would nevertheless be held to his contract, and that the fact that the agent made a similar agreement with a prior subscriber was no defense.³ A bank having been fraudulently got up under a lawful charter, by parties who induced a person to subscribe for a portion of the stock by representing to him that he would not be obliged to pay for it, it

²⁹ Conn. 137; Rensselaer, etc., P. R. Co. v. Wetmore, 21 Barb. 56; Upton v. Englehart, 3 Dillon, 496; Chubb v. Upton, 95 U.S. 665; Upton v. Tribblecock, 91 Ind. 45; Webster v. Upton, Ib. 65; N.E.R.R. Co. v. Rodrigues, 10 Rich. 278; Litchfield Bank v. Peck, 29 Conn. 384; Duffield v. Barnum, etc., Works, 31 Northwest Reporter, 310.

¹ Downie v. White, 12 Wis. 176; Nathan v. Whitlock, 9 Paige Ch. 152; New Albany, etc., R.R. Co. v. Slaughter, 10 Ind. 218; New Albany, etc., Co. v. Fields, Ib. 187; Robinson v. Pittsburgh, etc., R.R. Co., 32 Pa. St. 334;

Mann v. Cooke, 20 Conn. 179; Custar v. Titusville, etc., Co., 63 Pa. St. 381.

² White Mts. R.R. Co. v. Eastman, 34 N.H. 124. See Whitehall, etc., R.R. Co. v. Meyers, 16 Abb. Pr. 34; Buffalo, etc., R.R. Co. v. Dudley, 14 N.Y. 336; Jewett v. Valley R.R. Co., 34 Ohio St. 601.

³ Blodgett v. Morrill, 20 Vt. 509. See Hayden v. Atlanta Cotton Factory, 61 Ga. 234; Conn., etc., R.R. Co. v. Bailey, 24 Vt. 465; Swartwout v. Mich. Air Line R.R. Co., 24 Mich. 390; Melvin v. Lamar Ins. Co., 80 Ill. 446.

was held, in an action against him by the receiver of the bank, that, as he participated in the fraud, he could not avail himself, in defense, of the fraudulent character of the bank, or of the misrepresentations by which he had been induced to subscribe.¹ Where, under the order of the board of directors for additional stock, a subscription is made for a fraudulent purpose, the board should rescind the order and refuse to recognize the additional stock. But if it should receive the stock, the subscribers would be bound, as they could not be permitted to set up fraud to which they were parties, as a ground for their discharge;² as already stated.³

Parol representations made by an agent of a corporation by which a party is induced to subscribe, will not release the subscriber from liability if different from the terms of the agreement as stated in the subscription paper, every person being presumed to know the contents of an agreement signed by him.⁴ A party signed a stock subscription without reading it, relying upon the representations made by the agent, which representations proved to be false. It was held that the subscriber was holden.⁵ When the agent of a corporation makes false and exaggerated representations in relation to matters open to the investigation of both parties, intending thereby to induce persons to subscribe for the stock, a person so subscribing has no right to rely upon them, and if he does so, it will be no ground for avoiding his subscription.⁶ If a party purchases shares in a company upon the faith of a prospectus, and is referred to any document which will show

¹ Litchfield Bank v. Church, *supra*.

Fictitious subscriptions for the purpose of influencing other subscribers render void the subscriptions of the latter.

Middlebury College v. Loomis, 1 Vt. 189.

² Southern Plank R. Co. v. Hixon, *supra*.

³ *Ante*, sec. 191.

⁴ Clem v. Newcastle, etc., R.R. Co., 9 Ind. 488; Miss., etc., R.R. Co. v. Cross, 20 Ark. 443.

⁵ Thornburgh v. Newcastle, etc., R.R. Co., 14 Ind. 499.

⁶ Walker v. Mobile, etc., R.R. Co., 34 Miss. 245.

the untruth or inaccuracy of any of its statements, and chooses not to make use of his means of knowledge, but to continue in a state of wilful ignorance of the facts, he cannot afterward be heard to complain that he has been deceived by the alleged misstatements. In considering the question of knowledge or means of knowledge, it is important to see whether the plaintiff was a person likely through inexperience to be misled by a prospectus or to place implicit reliance upon all that it contains.¹ A person is not released from liability on a subscription by reason of his having been induced to subscribe by false representations, unless it can be proved that the agent making such representations was duly authorized.² Though a corporation be fraudulently conducted, a subscriber is not on that account released from liability on his subscription.³ Where prompt action has not been taken by a party asking for a rescission of his contract on the ground of fraud, he must show not only ignorance of the fraud, but also that such want of knowledge was not the result of his neglect to use the means of information within his reach.⁴

§ 194. Proof of fraud required in order to release subscriber.

—To escape liability on a subscription to the stock of a corporation upon the ground of false representations of its agent, it must be shown that the statement was not made as a conjecture, but as an ascertained fact.⁵ Representations that the corporation had sufficient stock subscribed to complete the work and would do it in a specified time, would not render a subscription voidable, as they are mere expressions of opinion upon an existing fact and its con-

¹ Hallows v. Fernie, L. R. 3, Ch. 477.

⁴ Parks v. Evansville, etc., R.R. Co.,

² Goodrich v. Reynolds, 31 Ill. 490; Mitchell v. Rome R.R. Co., 17 Ga.

23 Ind. 567; Chubb v. Upton, 95 U. S. 665.

574; First Nat. Bank v. Hurford, 29 Iowa, 579.

⁵ Coil v. Pittsburg Female College, 40 Pa. St. 439; Cunningham v. Edgefield, etc., R.R. Co., 2 Head. Tenn.

⁸ Smith v. Tallahassee P. R. Co., 30 Ala. 650.

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nnection with a future event.¹ How much, for instance, it will cost to construct a railroad, or whether the means will hold out, depend upon events which probably neither the corporation nor a subscriber can foresee.² The representation must not only be false in fact, but also must be either known to be so by the party uttering it, or his position must be one which makes it his duty to know the truth.³ A fraudulent intent may be inferred from evidence showing that the agent knew his statements were false, or that he professed knowledge of their truth, when in point of fact he was conscious that he had none.⁴ The subscriber must prove that he acted upon the assertions of the agent, that his own position was such as warranted him in so acting, and that they were in relation to facts material to his subscription. Even with these limitations the defense will not avail if the representations are respecting matters controlled by the charter, in reference to which the subscriber is legally bound to know that the agent has no right to make representations variant therefrom.⁵ As a rule, it is

¹ Hardy v. Merriweather, 14 Ind. 203; Bish v. Bradford, 17 Id. 490.

² Ibid.; Crossman v. Primrose Ferry Bridge Co., 26 Pa. St. 69. See Hughes v. Antietam Manuf. Co., 34 Md. 316; Walker v. Mobile R.R. Co., 34 Miss. 245; Pickering v. Templeton, 2 Mo. App. 424.

³ Ellison v. Miss. & Ohio R.R. Co., 36 Miss. 572; Selma, etc., R.R. Co. v. Anderson, 51 Id. 829. In a suit to enforce the payment of a subscription to stock, the defendant cannot set up that the subscription was obtained through fraud by means of a secret agreement by which other subscribers were to have their stock on different terms. As such other parties could not avail themselves of a secret fraudulent agreement, the defendant could not have been injured in the manner alleged.

Anderson v. Newcastle, etc., R.R. Co., 12 Ind. 376.

⁴ Nelson v. Luling, 36 N. Y. Sup. Ct. 544. For the purpose of showing fraud in the procuring of subscriptions, the declarations of the president and a director are admissible against the corporation. Rives v. Montgomery South P. R. Co., 30 Ala. 92. When it is claimed by a corporation that certificates of stock are spurious or have been fraudulently issued, the burden of proof is on the corporation. Bridgeport Bank v. New York & New Haven R.R. Co., 30 Conn. 231.

⁵ Selma, etc., R.R. Co. v. Anderson, *supra*. When a part of the consideration of a note is shares in a corporation to be issued, an illegal issue or increase of the capital stock will constitute a defense to the note only upon proof that

only the party originally defrauded who can repudiate the contract. A purchaser of shares from a subscriber who might have refused to pay his subscription on the ground that it was obtained by fraud, cannot on account of the original fraud have such shares cancelled.¹

§ 195. Rights of creditors in cases of fraudulent subscriptions.—When the rights of creditors intervene, the contract must be repudiated promptly upon discovering the fraud and before the bankruptcy of the corporation, or it will be binding as to them, and the subscriber will be liable for the unpaid balance on his stock;² *bona fide* creditors being entitled to rely upon the capital stock of the corporation, including the subscriptions of its members as security. The stock subscribed and owned by the several stockholders constitutes the capital or fund publicly pledged to all who deal with them, and the unpaid balance of their subscriptions is as much a part of the capital pledged, as the cash actually paid in. When that portion of the capital represented by these unpaid balances is required to pay the creditors of the corporation, the stockholders cannot be allowed to refuse payment, unless they show such an equity as would have entitled them to a preference over the creditors if the capital had been fully paid in. It is too late for such stockholders to withdraw their subscriptions, or to defend themselves from liability, as against creditors of the corporation, under a plea that their subscriptions were obtained by fraud and misrepresentation by an agent of the corpo-

the spurious stock cannot be distinguished from the genuine. If the illegal stock has been destroyed and the plaintiff is able and willing to deliver genuine stock to the defendant upon his payment of the note in suit, the defense will fail. *Merrill v. Reaver*, 50 Iowa, 404.

¹ *Duranty's Case*, 26 Beav. 268;

Grisewood's Case, 4 De G. & J. 544; *Cross v. Sackett*, 3 Bosw. 617.

² *Upton v. Englehart*, 3 Dillon, 496; *Saffold v. Barnes*, 39 Miss. 399; *Hamilton v. Grangers' Life, etc., Ins. Co.*, 67 Ga. 145; *Oakes v. Turquand*, L. R. 2, H. L. 325; *Stone v. City & County Bank*, L. R. 3, C. P. Div. 307; *Pugh v. Sherman's Case*, L. R. 13, Eq. 572.

ration, or otherwise, after debts have been incurred.¹ No person who, at the commencement of the winding up, is *de facto* a member, that is, who has by a contract not previously avoided, become a member, can withdraw from the distribution for the benefit of the creditors any part of the company's assets, either by recalling money paid by him to the company, or by taking himself off the list of contributors, that is to say, by taking himself out of the category of those liable to pay further calls. In consequence of the distribution of assets amongst the creditors, a member cannot insist upon the equity, which he might otherwise have claimed, to be relieved from his contract with the company.² In *Henderson v. The Royal British Bank*,³ Lord CAMPBELL, C. J., said : "This was an application for leave to take out execution against a shareholder ; and the proposed answer to the application was that the shareholder had been induced by fraud to take the shares. He had remained a shareholder for some time, and received dividends, and acted in all respects as a shareholder until the Royal British Bank stopped payment, and until its bankruptcy ; and he then gave notice that he was no longer a shareholder, and, as far as he could, disaffirmed the contract under which he became a shareholder, as being induced by the fraud of the directors ; he demanded back all the moneys he had paid, and, being a depositor himself, he demanded the deposit and all the advances. The question is whether, if it were established that this fraud had been practiced upon him, it could be an answer to this application. . . . This is an application by a creditor who, upon the faith of the party who was then a shareholder, and who held himself out to the world as a shareholder, and being one, gave credit to the bank. He has obtained judgment against the bank. There were no assets of the bank as a

¹ *Ogilvie v. Knox Ins. Co.*, 22 How 380.

² *Cotton, L. J.* 11, Exch. 314.
³ 7 El. & Bl. 356.

company. And the application now is that execution may issue against that party individually. It would be monstrous to say that he, having become a partner and shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice, and contrary to all principle."

Any secret understanding or arrangement between the corporation and a subscriber impairing the rights of creditors to look to the capital as security, will be a fraud upon them.¹ A person taking stock in a corporation and thus voluntarily allowing himself to be represented to the world as a stockholder, is not in a position, when sued for the benefit of creditors of the corporation for the balance due on such stock, to deny the authority of the corporation to issue stock and transact business. Where papers which have color of compliance with the statute have been filed with the proper State officers and been approved by them, but are in fact fatally defective as between the corporation and the State, they are, as against a subscriber to the capital stock, sufficient to constitute a corporation *de facto*, if supported by proof of user.²

§ 196. Rights of stockholders in undisposed-of shares.— When part of the authorized capital stock remains untaken at the time of the incorporation, the right to issue the remainder of it is a corporate franchise held by the corporation in trust for the corporators, and it must be disposed of for the benefit of all. A resolution of the board of

¹ Saffold v. Barnes, 39 Miss. 399; ² Upton v. Hansbrough, 3 Biss. Union Mut. L. Ins. Co. v. Frear, 97 Ill. 417.

directors distributing such shares among all of the stockholders who are not in arrears on shares already held by them, and excluding those who are, is *ex post facto* and void. Even the legislature would have no such power.¹

When new stock is issued which is entitled equally with the existing stock, holders of the latter can claim to have it equally distributed; that is, they have a right to subscribe for their proportionate share of the new stock.² But this rule does not apply to original stock bought in by the corporation, held as assets, and subsequently reissued.³ Where the charter of a corporation provides for an increase of the capital stock on a notice of sixty days, during which any stockholder may take additional shares, the failure of the stockholder to avail himself of the privilege during the time, will be deemed a waiver of it.⁴ In *Miller v. Ill. Cent. R.R. Co.*,⁵ the plaintiff was the holder of a receipt or certificate of the Illinois Central Railroad Company for \$7,500, to be repaid to him or his order with interest on demand, or received in payment of ten dollars on each share of the capital stock of the company, to be issued to him or to his assigns whenever the directors should authorize the issue of the second million of the stock. This receipt had been assigned to the plaintiff by indorsement on it, with the

¹ *Reese v. Bank of Montgomery County*, 31 Pa. St. 78; *Curry v. Scott*, 54 Id. 270. See *Eidman v. Bowman*, 58 Ill. 444; *Mason v. Davol Mills*, 132 Mass. 76; *Jones v. Morrison*, 31 Minn. 140.

² It was held in an early case in Massachusetts that if the corporation or its officers refused to permit a stockholder so to subscribe, he was entitled to a special action against the corporation for such refusal, in which the excess of the market value above the par value of the shares to which he

was entitled with interest on such excess, would be the measure of damages. *Gray v. Portland Bank*, 3 Mass. 364. See *Donsman v. Wisconsin, etc., Manf. Co.*, 40 Wis. 418.

³ *State v. Smith*, 48 Vt. 266; *Matter of Wheeler*, 2 Abb. Pr. N. S. 361.

⁴ *Hart v. St. Charles Street R.R. Co.*, 30 La. Ann. 758, EGAN, J., dissenting. See *Dayton, etc., R.R. Co. v. Hatch*, 1 Disney, 84; *Brown v. Florida Southern R.R. Co.*, 19 Fla. 472.

⁵ 24 Barb. 312.

right to take to his own use and account three hundred shares of the stock to be issued. The second million of stock was afterward issued by the company, and subsequently the company resolved to issue additional shares. If these additional shares had been distributed to the previous holders of stock in proportion to their shares, there would have fallen to each share of the old stock one and seven-eighths shares of the new, or to these three hundred shares of old stock, five hundred and sixty-two shares of the new. The three hundred shares of stock were delivered to the plaintiff, but no part of the new stock was allotted to him. The stock old and new was worth a premium of about thirty-five per cent. It was held that the receipt gave the holder of it only the option to take shares, and that he could not claim to be a holder of such stock until he had elected and given notice of his intention to take it; that his rights as to the new or additional stock must depend on the condition of things at the time such new stock was created, and that as it was more than a month afterward that plaintiff became holder of his three hundred shares, he could not retroactively acquire any right to a distributive share of the new stock; that as to the additional shares of stock, as soon as they were created, they belonged to the company, and were, like any other property, to be used for its benefit, and that no stockholder could demand as a right, that they should be divided among the stockholders in proportion to their respective interests. When the whole amount of capital stock has been taken up and issued, a subscriber who has not received any stock cannot be compelled to pay his subscription trusting to the president and directors to increase the stock.¹

A corporation has no power to subscribe for stock, or to raise money to pay the subscription, unless the power be expressly given by its charter. Where the amount to be

¹ McCord v. Ohio, etc., R.R. Co., 13 Ind. 220.

subscribed was \$50,000, the only means of raising money to meet the payment was by issuing bonds, and this power was expressly restricted to \$50,000, it was held that the bonds could only be issued at par.¹

§ 197. Promise of payment implied in subscription.—By subscribing to the stock of a corporation, a party may be considered as accepting a proposition to take the number of shares indicated, at the price named. It is a sale. The shares become vested in the subscriber, and he may be compelled to pay for them according to the terms of the subscription.² One who agrees to take a thing which is the subject of price or compensation, *ex vi termini* agrees to pay the price attached. The subscriber is bound to pay the amount subscribed, not as a personal obligation for the corporate debts, but as a liability for his own debt.³ Moreover, the mutual promises of the signers of a subscription paper constitute reciprocal obligations on each to pay the amount subscribed.⁴ Signing a subscription paper to defray the

¹ Neuse R. Navigation Co. v. Commrs. of Newbern, 7 Jones N. C. 275.

² Essex Bridge Co. v. Tuttle, 2 Vt. 393; Seymour v. Sturgess, 26 N. Y. 134; Mobile & Ohio R.R. Co. v. Yandal, 5 Sneed, 294; Instone v. Frankfort Bridge Co., 2 Bibb. 576.

³ Sagory v. Dubois, 3 Sandf. Ch. 466; Hartford, etc., R.R. Co. v. Kennedy, 12 Conn. 499; Danbury, etc., R.R. Co. v. Wilson, 22 Id. 435; Ogdensburg, etc., R.R. Co. v. Frost, 21 Barb. 541; Buckfield, etc., R.R. Co. v. Irish, 39 Me. 44; Penobscot, etc., R.R. Co. v. Dunn, Ib. 588; Cross v. Pinckneyville M. Co., 17 Ill. 54; Peoria, etc., R.R. Co. v. Elting, Ib. 429; Griswold v. Peoria University, 26 Id. 41; Chester Glass Co. v. Dewey, 16 Mass. 94; Palmer v. Lawrence, 3 Sandf. 161; Beene v. Cahawba, etc., R.R. Co., 3 Ala. 660; First Religious Soc. v. Stone, 7 Johns.

112; Dutchess Cotton M. Co. v. Davis, 14 Id. 238. Signing articles of association and subscriptions for stock under an act creating a mining company, imports a promise to the company to pay the amount of such subscription when called in, though the instrument does not contain an express promise to that effect. Carson v. Arctic Mining Co., 5 Mich. 288. See Heaston v. Cincinnati, etc., R.R. Co., 16 Ind. 275; Belfast, etc., R.R. Co. v. Cottrell, 66 Me. 185; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Mechanics', etc., Co. v. Hall, 121 Mass. 272; Katama Land Co. v. Jernegan, 126 Id. 156; Kennebec, etc., R.R. Co. v. Kendall, 31 Me. 470.

⁴ Watkins v. Eames, 9 Cush. 538; Ohio Wesleyan Female College v. Higgins, 16 Ohio St. 20. It makes no difference whether the promise is made to enable a corporate enterprise to com-

expense of repairing a church, or of erecting a new edifice, is a request to the agents of the corporation to perform the acts mentioned, with a promise to pay the amount subscribed.¹ In an action on a subscription to a paper agreeing "to pay the sums severally subscribed for the purpose of erecting an academy, no payments to be made until the sum of three thousand dollars *bona fide* subscription is made," it was held that as soon as the stipulated amount was subscribed the subscribers became an association, and the subscription of each, if not withdrawn before the actual organization of the company, became a contract by each associate with his fellows, in consideration of similar contracts by them, to contribute to the common fund the amount subscribed by him.²

A person who has subscribed to the stock of a corporation will be liable to pay the same, though in consequence of the failure of the corporation his shares have become worthless.³ Subscribers to the stock of a railroad company who give their notes in payment of their subscriptions, are liable thereon, although the work is abandoned, and the road is never completed.⁴ Where the stock of several con-

mence operations or to continue them. The consideration for the promise is substantially the same in both cases. Haskell v. Oak, 75 Me. 519; Conrad v. La Rue, 52 Mich. 83.

¹ Barnes v. Perine, 2 Kernan, 18.

² Edinboro Academy, 37 Pa. St. 210; 3 Grant, 107. A subscriber cannot, by announcing his withdrawal from the corporation, absolve himself from liability to pay further instalments on his subscription. Selma, etc., R.R. Co. v. Tipton, 5 Ala. 787.

³ Battershall v. Davis, 31 Barb. 323; Dill v. Wabash Valley R.R. Co., 21 Ill. 91.

⁴ Four Mile Valley R.R. Co. v. Bailey, 18 Ohio St. 208. See Chetlain v. Republic Life Ins. Co., 86 Ill. 220; Lake

Ontario R.R. Co. v. Curtiss, 80 N. Y. 219; Caley v. Phila., etc., R.R. Co., 80 Pa. St. 263. A subscriber will be liable on his subscription to the stock of a railroad company notwithstanding the subscriptions are for separate sections of the road, and the money is applied to the several sections indiscriminately; though work is begun on the road before twenty per cent. required by the charter has been paid in; though interest has been allowed subscribers on payments made; and though, by an amendment of the charter, the time for the completion of the road has been extended. Agricultural, etc., R.R. Co. v. Winchester, 13 Allen, 29. See Worcester R.R. Co. v. Hinds, 8 Cush. 110.

solidating railroad companies has not been previously subscribed, it may be done at any time before the consolidation takes place. Subscribers to such stock are not released from the payment of their subscriptions by reason of a subsequent consolidation. When consolidation under the act is consummated, a new corporation is created which is capable of succeeding to all the rights, privileges, and franchises of the parties to the agreement for consolidation, including debts due on account of subscriptions. But such succession does not occur until the election of a board of directors of the new corporation, the consolidating corporations continuing, for the purpose of holding and controlling their respective rights, until after the election.¹

Directors have no power to release subscribers to the stock from the payment of their subscriptions without consideration, when it will operate to the injury of the creditors of the corporation.² Where the directors allow some of the stockholders to settle their subscriptions in an illegal manner, the other stockholders will not be thereby discharged, because such act on the part of the directors being *ultra vires*, is a nullity, and will not prevent the corporation from collecting the full amount.³ A subscriber who has sold his certificate is liable as a shareholder until the name of the vendee is entered on the books of the corporation.⁴ Where a person who pays for stock in the notes of a third party, and gives an order on the corporation that upon payment of the notes an equal amount of stock shall be transferred to the payor, the stock does not pass until the notes are paid, and the original holder will be liable on his subscription, notwithstanding the corporation has renewed

¹ Mansfield, etc., R.R. Co. v. Brown, L. Ins. Co. v. Frear Stone, etc., Co., 97
26 Ohio St. 223. Ill. 537.

² Zirkel v. Joliet Opera House Co., ³ Macon, etc., R.R. Co. v. Vason, 57
79 Ill. 334; Thrasher v. Pike County Ga. 314.
.R.R. Co., 25 Id. 393. See Union Mut. ⁴ Midland, etc., R.R. Co. v. Gordon,
16 Mees. & Welsb. 804.

the notes without his knowledge or consent.¹ A person who has aided in obtaining the incorporation of a company and partaken of its benefits cannot deny its existence in order to escape its responsibilities. A member of a mutual insurance company when sued on his deposit note to meet a loss occasioned by fire cannot defend on the ground that he and his associates have not complied with the provisions of the charter.² Where the act of incorporation provides that the capital stock may be subscribed for or disposed of in whole or in part from time to time as the board of directors may think proper, the corporation has power to enforce payment on subscriptions, notwithstanding all of the stock has not been subscribed.³ A stockholder in a foreign corporation is liable to the corporation or for its debts, according to the *lex domicilii* of the corporation; or if under any other contract, according to the *lex loci contractus*.⁴

§ 198. Right of subscriber to certificate.—The shares of stock cannot be issued and delivered as a physical act.

¹ *Phoenix W. Co. v. Badger*, 67 N. Y. 294.

² *Trumbull County, etc., Ins. Co. v. Horner*, 17 Ohio, 407; *Selma, etc., R.R. Co. v. Tipton*, 5 Ala. 787; *Ryder v. Alton, etc., R.R. Co.*, 13 Ill. 516. Where an academy is chartered and trustees appointed upon the faith of a subscription paper, if a subscriber's acceptance of the legislative grant can be proved, as if he is named or descriptively included in the incorporation, has acted therein, been concerned in the subsequent proceedings, enjoyed the advantages of a member, or paid part of his subscription in money, materials, or labor, this will be a recognition of his promise with knowledge on his part that expense has been incurred and authorize a recovery against him to the amount of his subscription on

the ground of money expended at his request. *Farmington Academy v. Allen*, 14 Mass. 171.

³ *Hanover Junction, etc., R.R. Co. v. Haldeman*, 82 Pa. St. 36. The powers of a railroad company previous to the adoption of a clause in the constitution of a State that the legislature shall not authorize subscriptions to the stock of a corporation by counties and cities except as the constitution prescribes, are not affected by the provision, and a county will be liable on its subscription if in accordance with such original powers. *County of Callaway v. Foster*, 93 U. S. 567, MILLER, DAVIS, FIELD, and BRADLEY, JJ., dissenting. See *Aspinwall v. Daviess County*, 22 How. 364; *County of Scotland v. Thomas*, 94 U. S. 682.

⁴ *Seymour v. Sturgess*, 26 N. Y. 134.

What the corporation can do, and what under some circumstances it may be compelled to do, is to issue and deliver written proof of the existence of shares and of the ownership of them, usually called stock certificates. When shares are sold, an assignment of the stock in writing is made by the former owner of it with a power of attorney to transfer it on the books of the corporation which are kept for that purpose, and upon the production of that paper the nominated attorney makes the formal transfer, the old certificate is cancelled, and a new one is issued to the new owner.¹ A person who receives from the owner a certificate of shares of stock in a corporation with a transfer indorsed thereon and a power of attorney to transfer the same, has not a legal title to the stock so assigned as against the corporation, although when the certificate was delivered to him he advanced money on it, but only an equitable title, valid against the party named in the certifi-

¹ *Burrall v. Bushwick R.R. Co.*, 79 N. Y. 211. "In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. It is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country, shares in corporations are universally bought and sold without reference to the consent of the other shareholders." *DILLON*, J., in *Johnson v. Laflin*, 5 *Dillon*, 65. In *Weston's Case*, L. R. 4, Ch. 20, *PAGE WOOD*, L. J., said: "I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but they are partnerships from which members can retire at

once and free themselves from responsibility at any time they please by going into the market and disposing of and transferring their shares without the consent of directors or shareholders or of anybody, provided only it is a *bona fide* transaction, by which I mean an out and out disposal of the property without retaining any interest in them. . . . It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And, I may add, that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them and would impose upon them much more onerous duties than any which are really imposed upon them by this clause."

cate, to compel a transfer of the shares on the books of the corporation while they remain in his name.¹ It is a matter of no concern to the assignor whether the assignee ever avails himself of the power of attorney embodied in the assignment to have the stock transferred to him on the books of the corporation so that he may become the legal as well as the equitable owner. Equity will give the assignor no relief against the *bona fide* sale of stock in that way, although the assignee may never choose to have the stock transferred to him under the by-laws of the corporation. As between the assignor and assignee it is a binding contract against which the assignor is not entitled to relief any more than he would be in case of the sale of anything else made assignable by law although imperfectly done. The stock owned by a party in an incorporated company may be regarded as similar in its nature to a *chase in action*, the equitable title of which, as between the parties, may be transferred without observing the requirements of the charter or by-laws of the corporation.² The certificate

¹ New York, etc., R.R. Co. v. Schuyler, 38 Barb. 534. It was said by the court in a recent case in Maryland that when in order to create membership transfers of shares are required to be entered on the books of the corporation, the old membership does not wholly cease until the transfers are duly entered; but that, as between the assignor and assignee of stock, the latter is the equitable owner when the certificate is assigned and delivered to him. Swift v. Smith, 65 Md. 428. When a certificate of stock is given in the usual form, the stock is presumed to have been fully paid, and if not, a purchaser without notice is not liable to creditors. Johnson v. Lullman, 88 Mo. 567; 15 Mo. App. 55.

² Otis v. Gardner, 105 Ill. 436; Hawley v. Brumagim, 33 Cal. 394; Payne v. Elliot, 54 Id. 339; Cincinnati, etc.,

R.R. Co. v. Pearce, 28 Ind. 102; Johnson v. Albany, etc., R.R. Co., 40 How. Pr. 193. See Kellogg v. Stockwell, 75 Ill. 68; People's Bank v. Gridley, 91 Id. 457; Laing v. Burley, 101 Id. 591; Nat. Bank v. Watsontown Bank, 105 U. S. 217. "One who, as a purchaser or lender, gives value on the faith of a certificate of stock authenticated by the seal of the corporation and the signatures of the proper officers acquires an equitable title, and may require the corporation to transfer the stock to him or respond in damages for the default. It is not a sufficient answer to such a demand that the certificate was fraudulently issued, because corporations are, not less than natural persons, answerable for the conduct of their agents in the business intrusted to their care. Nor is it necessarily conclusive against such a purchaser that the party from

is only evidence of ownership. Its issue and acceptance shows an acknowledgment of that fact by both parties, but such acknowledgment may be inferred from other facts in the absence of a certificate. A share of stock like other property may be sold on credit, if such be the contract of the parties and the usual evidence of title be absent.

Where, in addition to the fact of subscription, the corporation has recognized the alleged stockholder as such, he will be deemed a stockholder.¹ A subscriber is liable to an action on his refusal to pay, and the delivery of the stock certificate is not a condition precedent to a demand.² H. executed to a corporation a bond by which he acknowledged the receipt from the corporation of ten shares of its stock, and agreed within a time named to pay the corpora-

whom he bought was cognizant of or participated in the fraud. If a certificate of stock is not a negotiable instrument, it is a written declaration that the holder has a definite share in the capital or profits of the concern, which, though delivered to him, is intended for circulation and virtually addressed to all the world, and third persons who are misled by such an instrument may justly require that the loss shall fall on the corporation and not on them." *Willis v. Fry*, 13 Phila. 33, per HARE, P. J.

¹ *Wheeler v. Millar*, 90 N. Y. 353; *Mechanics' Bank v. New York*, etc., R.R. Co., 7 Id. (3 Seld.) 627; *New York*, etc., R.R. Co. v. *Schuyler*, 17 N. Y. 592; *Burr v. Wilcox*, 22 Id. 551; *Chaffin v. Cummings*, 37 Me. 76; *Minneapolis Harvester*, etc., Co. v. *Libby*, 24 Minn. 337; *Haynes v. Brown*, 36 N. H. 545; *Becket v. Houston*, 32 Ind. 393; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *South Georgia*, etc., R.R. Co. v. *Ayres*, 56 Ga. 597; *Clark v. Continental Imp. Co.*, 57 Ind. 135; *Cherry v. Frost*, 7 Lea, Tenn. 1; *Bridgeport Bank v. N.*

Y. & N. H. R.R. Co., 30 Conn. 231. Plaintiffs agreed with defendant that they would transfer to him certain mining property, on which he was, at his own expense, to organize a stock company, giving plaintiffs one-tenth of the stock. The company was duly organized, and one-tenth of the stock assigned on the books of the company to the plaintiffs. An assessment was ordered by vote of the company on the stock, but the secretary refused to give the plaintiffs a certificate of the stock unless they paid the assessment. It was held that the plaintiffs had no cause of action against the defendant, as he had fulfilled his contract. *Field v. Pierce*, 102 Mass. 253.

² *Fulgam v. Macon*, etc., R.R. Co., 44 Ga. 597; *Shelbyville v. Shelbyville*, etc., T. Co., 1 Metc. Ky. 54. Where a certificate of stock stipulates for the payment of semi-annual interest, the corporation cannot by a vote, without the assent of the holder, oblige him to receive its bond instead of money for the interest due on such certificate. *McLaughlin v. Detroit*, etc., R.R. Co., 8 Mich. 100.

tion \$200, or twenty per cent. of the par value of the stock as follows: \$50 upon receiving the stock certificate, and the balance in three, six, and nine months. When the bond was delivered, H. paid \$25, and his name was entered on the books of the corporation as a stockholder, and published as such, the latter fact, however, being unknown to him. He made no other payment, no certificate of stock was delivered or demanded, and no calls made upon him prior to the bankruptcy of the corporation, which occurred a few months afterward. It was held that as a certificate was not necessary to perfect H.'s subscription, its non-delivery did not prevent a recovery in an action against him by the assignee in bankruptcy for the unpaid instalments.¹ In an early case in Massachusetts, under an act providing that certificates should be delivered to stockholders, it was held that this might be compelled in equity, but that the want of a certificate would not prejudice a stockholder.²

For the protection of the rights of the lawful owner of shares, the corporation is bound to use reasonable care in the issuing of certificates. If, owing to the form of the certificate, or otherwise, the corporation has notice that the holder is not the owner of the shares, and has no right to transfer them, and the corporation negligently and wrongfully issues a certificate to his assignee, the corporation will

¹ Hawley v. Upton, 102 U. S. (12 Otto) 314.

² Chester Glass Co. v. Dewey, 16 Mass. 94. Where certain parties associated in the formation of a joint stock company for the purpose of holding in the name of a trustee, and improving real estate, manufacturing lumber, etc., and, to that end, fixed the nominal amount of their capital stock, apportioned the same, and issued transferable certificates therefor to the several parties in interest, it was held that these certificates represented an inter-

est in the real and personal property of the association which a court of equity would protect, and which could be sold or mortgaged by the owner like other species of property, and that sales or pledges of them had the effect to convey or incumber the vendor's proportion of the joint property, subject to the indebtedness of the association, and the equitable rights of other parties. Durkee v. Stringham, 8 Wis. 1. See Noyes v. Spaulding, 27 Vt. 420; Munn v. Barnum, 24 Barb. 283.

be liable to the true owner, without proof of fraud or collusion.¹ Under an act of incorporation providing that certificates shall be signed by the president and directors, and countersigned by the treasurer, if the signatures of the directors be omitted, the certificates issued without their authority will be void.² Neither the corporation, nor its directors, have the right to make and put on the market certificates purporting to represent capital stock which has not in fact been subscribed and paid for. It is not a question of good faith, or of honest intention, or of wise policy, or of skilful or discreet management on the part of the directors, but one of power; and the transfer of the illegal issue may be enjoined, and the proceeds be held by the court to protect the corporation against damages in favor of the holders of the false certificates, or to enable it to retire them.³

If the certificate is forged, or the holder is not such *bona fide*, so that he has no claim on the corporation, the vendor is liable to the vendee on the implied warranty of title. Where, however, there has been a fraudulent issue of stock, a *bona fide* holder has a right of action against the corporation; and the measure of damages will be the market value of his stock at the time the transfer was demanded.⁴

¹ Loring v. Salisbury Mills, 125 Mass. 138. Certificates of stock which on their face are not distinguishable from those that are genuine, confer upon each holder a *prima facie* right as a stockholder. New York, etc., R.R. Co. v. Schuyler, 17 N. Y. 592. When, however, stock is offered for sale under suspicious circumstances, the person to whom it is so offered is put on inquiry and is chargeable with notice. Anderson v. Nicholas, 28 N. Y. 600. Where one who, having indorsed a stock certificate in blank, intrusts it to an agent who sells or pledges it in fraud of the owner's rights, the latter cannot reclaim it from an innocent holder for

value. Burton v. Peterson, 12 Phila. 397. So, when a certificate of stock has been stolen, a purchaser of it in good faith will acquire a valid title to the stock against an unregistered owner. Winter v. Belmont Mining Co., 53 Cal. 428. If the president and secretary of a corporation wrongfully cancels a certificate of stock the corporation is liable. Factors', etc., Ins. Co. v. Marine Dry Dock, etc., Co., 31 La. Ann. 149.

² Holbrook v. Fauquier, etc., T. Co., 3 Cranch, 425.

³ Fisk v. Chicago, Rock Island & Pacific R.R. Co., 53 Barb. 513.

⁴ People's Bank v. Kurtz, 99 Pa. St.

§ 199. Assessments and calls.—Assessments, as understood in contracts of subscription, mean a rating or fixing by the board of directors or corporation of the proportion which each subscriber is to pay when notified of it, and when called on.¹ Courts will not inquire into the wisdom or necessity of an assessment, or the motives which prompt it, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated justify the expenditure of the money to be raised.² But assessments cannot be made binding upon stockholders beyond what the charter directs or the law applicable to the subject authorizes.³ A general act pro-

344. If a corporation issues false certificates of stock, or permits fraudulent transfers of spurious stock, it will be liable to the party directly deceived and injured by the corporation; and the corporation is responsible in this respect for the acts or negligence of its agents while engaged in its business to the same extent, and under the same circumstances that a natural person is charged with the acts or negligence of his agent. *New York, etc., R.R. Co. v. Schuyler*, 34 N. Y. 30; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616. Where the agent of a stockholder being authorized by him sold and transferred for a valuable consideration the certificate of the stock to A., and the original owner of the stock afterward sold it to B., who purchased in good faith and without notice of A.'s rights, and the stock was transferred to B. upon the books of the corporation and a new certificate issued to him, it was held that the corporation was liable to A. *Strange v. Houston & Texas R.R. Co.*, 53 Texas, 160, *MOORE, C. J.*, dissenting. See *Cleveland, etc., R.R. Co. v. Robbins*, 35 Ohio St. 483. Where a party was the equitable owner of shares of capital stock, certificates of which were out-

standing in the name and possession of another party claiming title, it was held that the corporation was not obliged to decide between the contending claimants. *Nat. Bank of New London v. Lake Shore, etc., R.R. Co.*, 21 Ohio St. 221. When a certificate is lost, the owner may be required to give the corporation a bond of indemnity against loss in case a superior title should be established. *Galveston City Co. v. Sibley*, 56 Texas, 269.

¹ *Spangler v. Indiana, etc., R.R. Co.*, 21 Ill. 276. See *Worcester T. Co. v. Willard*, 5 Mass. 80; *Gilmore v. Pope*, Ib. 491.

² *Oglesby v. Attrill*, 105 U. S. 605. See *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Penobscot, etc., R.R. Co. v. Dunn*, 39 Id. 587; *Buckville Branch R.R. Co. v. Irish*, Ib. 44; *Kirksey v. Florida, etc., P. R. Co.*, 7 Fla. 23. A city is not estopped from denying the legality of an assessment by reason of a vote of the common council authorizing the payment of it, the vote not being a contract. *Pike v. Bangor, etc., P. R. Co.*, 68 Me. 445.

³ *Great Falls, etc., R.R. Co. v. Copp*, 38 N. H. 124. Where a party agrees in writing that on the execution and

vided that the company should cause its articles of association to be recorded, and that thereafter it should be a body politic and corporate. It was held that the recording of the articles was a condition precedent to the investment of the company with corporate power, and that as the procuring of an assessment to be made was a corporate act, it could not be legally done until after the articles of association were recorded.¹ Although an assessment must be limited to the legitimate object of the charter and by-laws, yet a reasonable discretion in fixing the amount to be assessed can be exercised, which may properly include the necessary expenses of collection.²

A corporation has not an incidental power at common law to assess for its own use a sum of money on the corporators and compel them by action to pay it. To authorize such an assessment, the power must be derived from a statute.³ An act which authorizes assessments against stockholders who have paid the full amount of their sub-

delivery to him of certain mortgage bonds by the directors, he will pay specified assessments, the delivery of the bonds is a condition precedent to the payment of the assessments. Belfast, etc., R. Co. v. Moore, 60 Me. 561.

¹ McIntire v. McLain, etc., Asso., 40 Ind. 104.

² Jones v. Sisson, 6 Gray, 288. If assessments are levied by virtue of a by-law, a stockholder, who assisted in framing the by-law and voted for its adoption, is estopped from questioning it. Willamette Freighting Co. v. Stan-nus, 4 Oregon, 261.

³ Andover, etc., T. Co. v. Guild, *supra*; Katama Land Co. v. Jernegan, 126 Mass. 155. See Dewey v. St. Albans Trust Co., 59 Vt. 332; Gardner v. Hope Ins. Co., 9 R. I. 194; Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. 52; Smith v. Huckabee, 53 Ala. 191;

Green v. Beckman, 59 Cal. 545; Terry v. Little, 101 U. S. 216; Walker v. Lewis, 49 Texas, 123; Spense v. Iowa Valley, etc., Co., 36 Iowa, 407; Jones v. Jarman, 34 Ark. 323; Woods v. Hicks, 7 Lea, 40. Certain persons, including the defendant, agreed to take and pay for stock in a company to be organized agreeably to the provisions of the statute, and, before applying to the attorney-general for his certificate, voted for one assessment, and for another after such certificate had been refused. Subsequently a portion of the subscribers, without the concurrence of the defendant, procured the passage of an act of incorporation to effectuate the purpose originally contemplated. It was held that the company so incorporated could not enforce the payment of the assessments previously laid against the defendant. Richmond F. Assoc. v. Clarke, 61 Me. 351.

scriptions, and who, by the charter of the corporation or the laws under which it is organized, are not individually liable for its debts, has been held unconstitutional.¹ No further assessment can be imposed upon paid stock without special authority.² A clause in the charter that the shares shall not be subject to assessment after the amount of capital stock has been realized except in equal proportions and by consent, authorizes a further assessment only upon compliance with those conditions. Such an assessment can be made at a special meeting only when notice of the meeting and its object has been given to the stockholders. An assent to one illegal assessment will not be a ground for presuming another, so as to make it binding by way of contract.³

After the number of shares of which the stock is to consist is determined, which, if not fixed by the charter, must be done by the directors or the stockholders, and the required amount of subscriptions obtained, the board of directors has in general power to levy assessments upon the unpaid stock so subscribed.⁴ When the charter of a cor-

¹ Ireland v. Palestine, etc., T. Co., 19 Ohio St. 369; Zabriskie v. Cincinnati, etc., R.R. Co., 23 How. 381; State v. Morristown F. Assoc., 3 Zab. 195. The pews of a church were, by a vote of the corporation, sold free from rent. O. bought and occupied a pew. It was held that this did not render him personally liable on assessments on pews to defray the expenses of the church. First Presb. Cong. v. Quackenbush, 10 Johns. 217.

² Gardner v. Hope Ins. Co., 9 R. I. 194.

³ Windham, etc., Inst. v. Sprague, 43 Vt. 502; Inhabts. of Norton v. Hodges, 100 Mass. 241; Chase v. Lord, 77 N. Y. 1; French v. Teschemaker, 24 Cal. 518; Atlantic De Laine Co. v. Mason, 5 R. I. 463. When the legislature has reserved the power to alter, amend, or repeal the charter at pleasure, an

amendment authorizing an assessment on the paid-up shares of an insurance company to make good its losses, is valid. Gardner v. Hope Ins. Co., 9 R. I. 194. In California, stock may be assessed after it is fully paid up. Santa Cruz R.R. Co. v. Spreckels, 65 Cal. 193. In Pennsylvania, the act of April 29, 1874, conferred upon corporations a right to assess upon each share of stock such sums of money as the corporation might think proper, not to exceed, in the whole, the amount at which each share was originally limited. The assessment thus authorized, is not a part of the subscription money to be paid for the shares, but in addition to and independent of the capital raised by the sale of the shares. Price's Appeal, 106 Pa. St. 421.

⁴ Somerset R.R. Co. v. Clarke, 61 Me. 379; Willamette Freighting Co. v.

poration prescribes a limit to the shares of its capital stock, the number to be determined from time to time by the directors, an assessment which is levied before the directors have fixed the number of shares cannot be enforced.¹ It is, of course, the same when the number of the shares is to be fixed by vote or by-law passed conformably to the charter.²

When the number of shares into which the capital stock shall be divided is determined by the charter, in the absence of a provision that assessments may be levied before the entire stock is taken, a subscriber cannot be charged upon his subscription until the whole capital stock has been subscribed, unless he has by his acts waived his right to insist upon that condition.³ The charter of a railroad company declared that no instalment on subscriptions to stock, after the first, should be called for until at least \$500,000 of the capital stock had been subscribed. After subscriptions to the amount of \$200,000 had been made, a contractor agreed with the company to construct a portion of the road and to receive in part payment stock to the amount of \$300,000.

Stannus, 4 Oregon, 261; Grosse Isle Hotel Co. v. Panson, 42 N. J. 10. See Richmond F. Assoc. v. Clarke, *supra*; Selma, etc., R.R. Co. v. Anderson, 51 Miss. 829; Hunt v. Kansas, etc., Bridge Co., 11 Kans. 412; Peoria, etc., R.R. Co. v. Preston, 35 Iowa, 115; Wells v. Rodgers, 50 Mich. 294.

¹ Troy, etc., R.R. Co. v. Newton, 8 Gray, 596; Worcester, etc., R.R. Co. v. Hinds, 8 Cush. 110; Cabot, etc., Bridge v. Chapin, 6 Id. 50; Oldtown, etc., R.R. Co. v. Veazie, 39 Me. 571; Somerset, etc., R.R. Co. v. Cushing, 45 Id. 524.

² Allman v. Havana, etc., R.R. Co., 88 Ill. 521; Stoneham Branch R.R. Co. v. Gould, 2 Gray, 277; Salem Mill Dam v. Ropes, 6 Pick. 23.

³ New Haven Cent. R.R. Co. v. Johnson, 30 N. H. 390; Contocook Valley R.R. Co. v. Barker, 32 Id. 363; Con-

tinental T. Co. v. Valentine, 10 Pick. 142; Peoria, etc., R.R. Co. v. Preston, 35 Iowa, 116; Selma, etc., R.R. Co. v. Anderson, 51 Miss. 829; Mass. Iron Co. v. Hooper, 7 Cush. 183; Lewey's Island R.R. Co. v. Bolton, 48 Me. 451; Hamilton, etc., P. R. Co. v. Rice, 7 Barb. 157; Hughes v. Antietam Manf. Co., 34 Md. 316. See North Safford Steel, etc., Co. v. Ward, L. R. 3, Exch. 172. Subscriptions to the entire amount of stock of a corporation is not a condition precedent to legal corporate existence in Oregon, the doctrine under the general incorporation laws of that State being that whenever a corporation is so organized as to be capable of prosecuting its business, it has power through its board of directors to levy assessments. Oregon Cent. R.R. Co. v. Scoggin, 3 Oregon, 161; Willamette Freighting Co. v. Stannus, 4 Id. 261.

It was held that such agreement was not a subscription within the charter, and that *bona fide* subscribers were entitled to require that subscriptions like their own to the amount of \$500,000 should be made before they should be liable for further instalments.¹ An act of incorporation provided that the members might divide the capital stock into as many shares as they thought proper. By the subscription paper the capital stock was divided into five hundred shares of \$100 each; but only one hundred and thirty-eight shares were subscribed. It was held that no assessment for the general purposes of the corporation could be legally made until all of the shares were taken.² Where the amount of capital stock is not fixed by charter or statute, but there is a provision of law determining the minimum and maximum limit of the number of shares, assessments, when the subscription is between those limits, will be enforced.³ Under a charter directing by whom assessments shall be made, the power cannot be delegated.⁴ When, however, the charter provides that the stockholders may issue calls for instalments on the stock, and that after the corporation is or-

¹ N. Y., etc., R.R. Co. v. Hunt, 39 Conn. 75.

² Littleton Manf. Co. v. Parker, 14 N. H. 543.

³ Penobscot, etc., R.R. Co. v. Bartlett, 12 Gray, 244; Penobscot R.R. Co. v. Dummer, 40 Me. 172. When the articles contemplate the commencement of business as soon as a specified amount, less than the whole capital stock, is subscribed, the company may call for instalments as soon as that amount is subscribed. Nichols v. Burlington, etc., P. R. Co., 4 Greene, Iowa, 42. Where the terms of subscription are that not more than five dollars a share shall be assessed at one time, several assessments may be voted for at one time if payable at different times, Penobscot v. Dummer, *supra*.

⁴ Silver Hook Road v. Greene, 12 R. I. 164; Rutland, etc., R.R. Co. v. Thrall, 35 Vt. 536; Farmers' Mut. Ins. Co. v. Chase, 56 N. H. 341; Macon, etc., R.R. Co. v. Vason, 57 Ga. 314; Banet v. Alton, etc., R.R. Co., 13 Ill. 513; Spangler v. Ind., etc., R.R. Co., 21 Id. 276; People's Mut. Ins. Co. v. Westcott, 14 Gray, 440; Pike v. Bangor, etc., R.R. Co., 68 Me. 445. Where on the failure of shareholders to pay legal assessments, an act authorizes a sale of the shares and a recovery of the balance remaining unpaid, the sale must be made in strict conformity with the statute. If the sale is directed to be made by an order of the directors, they cannot delegate their power in this respect. York, etc., P. R. Co. v. Ritchie, 40 Me. 425.

ganized they may elect directors to manage the corporate business, they may, by resolution, authorize the directors to issue calls.¹ A clause in the corporation act of Massachusetts of 1809 provided that a corporation might, from time to time, at any legal meeting called for the purpose, assess upon each share such sum or sums of money as should be judged by the corporation to be necessary. It was held that this vested in the corporation exclusive power to lay assessments, which could not be delegated to the directors, and that a by-law authorizing the directors to take care of the interests and manage the concerns of the corporation, did not admit of an interpretation which would include any such delegation of authority.²

A provision in the subscription and stock certificate that the balance due on the stock is to be paid on the call of the directors when ordered by a vote of the majority of the stockholders, does not prevent this power being exercised by the courts. After the commencement of proceedings in bankruptcy against a corporation, the court can, by virtue of its authority, make or direct any assessment or call necessary for or preliminary to the collection of the assets, as fully as the directors or stockholders might have done if the corporation had not gone into bankruptcy.³

When the time and manner of making payment is left wholly in the discretion of the directors, they may call for the whole amount subscribed, or permit it to be paid in instalments.⁴

¹ Rives v. Montgomery South P. R. Co., 30 Ala. 92.

² Winsor, *ex parte*, 3 Story, 411.

³ Upton v. Hansbrough, 3 Biss. 417. When the owner of shares has neglected to pay legal assessments and the shares have been sold and transferred by the corporation to another person according to law, in order to maintain an action for the deficiency upon the ground of statute liability, the terms of

the statute must be strictly complied with. If the assessment is illegal, a sale of the stock will be void. Lewey's Island R.R. Co. v. Bolton, 48 Me. 451.

⁴ Hann v. Mulberry Gravel Road Co., 33 Ind. 103. In this case, by the terms of subscription payment was to be made in such instalments as might be called for by the directors; but the statute under which the corporation was organized authorized the directors to re-

§ 200. **Notice of calls.**—When the time and place of payment are stated in the subscription, and the charter does not provide that notice of a call for the amount payable on an assessment shall be given, a subscriber will be liable therefor without any notice of a call for the same.¹ Articles of association provided that the capital stock should be called in at such times and in such manner as might from time to time be determined by the board of directors. By another clause the subscribers agreed to pay to the association the sum of \$100 for each share subscribed in the manner specified in the articles of association. It was held that the defendant was liable on calls for instalments without

quire payments "at such times and in such proportions as they should see fit." It was held that the directors might require the subscription to be paid at one time, or might divide it into such instalments as to them seemed proper. When the charter provides that all assessments shall be determined by the directors, and lays down rules for the guidance of the directors in their determination, if the assessments are made according to the charter and by-laws, this is sufficient to make an assessment payable. *Atlantic F. Ins. Co. v. Sanders*, 36 N. H. 252. A subscriber to stock when sued on his subscription cannot object that the board of directors making the call was elected out of the limits of the State. The directors having accepted their offices and acted under their election, they become directors *de facto*, and their authority to act in behalf of the corporation cannot be questioned in a collateral suit without showing a judgment of ouster against them in a direct proceeding by the government. *Ohio & Miss. R.R. Co. v. McPherson*, 35 Mo. 13. *BATES*, J., dissenting, said: "The persons who made the last call were not directors, the pretended election of them being an

absolute nullity. There is nothing in the whole case which tends to show that the defendant in any manner, at any time or place, ever recognized them as directors. He recognized the existence of the corporation, and is estopped from denying it; but he did not recognize those persons as directors, and the acts of other persons without his consent cannot bind him."

¹ *Wilson v. Wills Valley R.R. Co.*, 33 Ga. 466; *Eppes v. Miss., etc., R.R. Co.*, 35 Ala. 30; *Smith v. Plank R. Co.*, Ib. 650; *Smith v. Ind., etc., R.R. Co.*, 12 Ind. 61; *Eakright v. Logansport, etc., R.R. Co.*, 13 Id. 404; *Peake v. Wabash R.R. Co.*, 18 Ill. 88; *Waukon, etc., R.R. Co. v. Dwyer*, 49 Iowa, 121; *Penobscot R.R. Co. v. Dummer*, 40 Me. 172; *Lake Ontario R.R. Co. v. Mason*, 16 N. Y. 481; *Phoenix Warehousing Co. v. Badger*, 67 Id. 294. See *Alabama, etc., R.R. Co. v. Rowley*, 9 Fla. 508; *Estell v. Knightstown, etc., Co.*, 41 Ind. 174; *Braddock v. Phila., etc., R.R. Co.*, 45 N. J. 363; *Cheraw, etc., R.R. Co. v. Garland*, 14 S. C. 63; *Glenn v. Williams*, 60 Md. 93; *Sanger v. Upton*, 91 U. S. 56; *Hatch v. Dana*, 101 Id. 205; *Scoville v. Thayer*, 105 Id. 143.

notice, though the statutory notice of thirty days might have been required to enforce a forfeiture.¹ The general rule that where the law requires notice to be given to a party to fix his liability, and the mode of giving such notice is not prescribed, it must be personal, does not apply to the case of a defaulting subscriber, when personal notice is not required by the charter or by the terms of subscription.² Where no particular mode of giving notice of assessments is prescribed, notice to each individual assessed through a circular, if seasonably given, will be sufficient.³ The same is true of publication in a newspaper.⁴ If the payment is to be partly in produce, and no place is specified at which to deliver it, the notice must be personal.⁵ When the statute specifies how a demand shall be made for the payment of instalments the provisions of the act in this respect must be strictly complied with. If, for instance, it directs that there shall be a personal demand, a written notice through the mail will not be sufficient.⁶ So, if the charter requires a particular notice to be given a specified number of days before instalments are payable, the corporation must show compliance.⁷ When a subscriber has received

¹ Eastern P. R. Co. v. Vaughan, 20 Barb. 155. When a subscriber has notice that an instalment on his stock is due, no demand by the corporation is necessary. Winter v. Muscogee R. R. Co., 11 Ga. 438.

² Grubbs v. Vicksburg, etc., R.R. Co., 50 Ala. 398.

³ Jones v. Sisson, 6 Gray, 288.

⁴ Hall v. U. S. Ins. Co., 5 Gill, 484. In this case the capital stock was divided into ten thousand shares. The court remarked that no proportionate object would be attained for the great inconvenience, labor, and expense incident to personal notification conceding it to be practicable. "Persons who are stockholders in such a corporation are not inattentive to the concerns thereof,

and obtain information in relation to its proceedings either through their own inquiries, or the communications of friends resident at or near its office of business, or from publications in newspapers edited in its vicinity. The substitution of such newspaper publications in lieu of personal notice has so long been a universal usage, and of notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land." Ib.

⁵ Essex Bridge Co. v. Tuttle, 2 Vt. 393.

⁶ Hughes v. Antietam Manf. Co., 34 Md. 316.

⁷ Macon, etc., R.R. Co. v. Vason, 57 Ga. 314; Miss., etc., R.R. Co. v. Gas-

notice of a call, a provision requiring a different notice has been held merely directory.¹ Notice of a call on stockholders to pay their subscriptions is necessary to subject them to a prescribed penalty for non-payment.² If the time of payment is fixed by the terms of the subscription, it dispenses with the necessity of exercising the power conferred upon the directors to make the call and fix the time.³ But when the corporation has the right to determine the time of payments on subscriptions, a subscriber is entitled to notice of the time before an action can be maintained to recover on the contract.⁴ Where subscriptions are payable in a certain time after a call, the subscriber is entitled to a notice for that length of time.⁵ A call for instalments on stock made by one of two or more consolidated companies, continues to operate for the benefit of the new company as successor to all the rights of the old ones.⁶ A call for the first instalment on the stock is sufficient notice that the requisite amount of stock has been subscribed.⁷ When a subscriber upon being notified that an instalment

ter, 20 Ark. 455. Where the charter requires as a condition precedent to suits for instalments due on stock that there shall be previous notice, and there is no waiver of the condition, notice must be given; but not, with reference to such suits, under a law providing that there shall be notice or personal demand before a proceeding to forfeit the stock. *Heaston v. Cincinnati, etc., R.R. Co.*, 16 Ind. 275; *Smith v. Indiana, etc., R.R. Co.*, 12 Id. 61; *Jackson v. Crawfordsville, etc., R.R. Co.*, 11 Id. 61.

¹ *Lexington, etc., R.R. Co. v. Chandler*, 13 Metc. 311; *Miss., etc., R.R. Co. v. Gaster*, 20 Ark. 455. A mistake of the corporate name in giving notice of a call on the stockholders for their instalments, is immaterial. *Gray v. Monongahela Nav. Co.*, 2 Watts & Serg. 156. See *Danbury, etc., R.R. Co. v. Wilson*, 22 Conn. 435.

² *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 302. A provision of a by-law that ten per cent. should, upon subscription, be payable, or the subscription be void, was held to mean, not that each subscriber was obliged actually to pay his ten per cent., but that this amount should, upon subscription, become due and payable whenever the corporation called for it. *Piscataqua F. Co. v. Jones*, 39 N. H. 491.

³ *Estell v. Knightstown, etc., T. Co.*, 41 Ind. 174.

⁴ *Wear v. Jacksonville, etc., R.R. Co.*, 24 Ill. 593.

⁵ *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

⁶ *Mansfield, etc., R.R. Co. v. Stout*, 26 Ohio St. 241.

⁷ *Harlem Canal Co. v. Seixas*, 2 Hall, 504.

is payable, replies that he is not a stockholder, it is a waiver by him of notice of future calls, and operates as if the subsequent notices were regularly given.¹ A notice of the sale of shares for the non-payment of assessments should specify the time and place of sale, and be given a reasonable length of time beforehand.²

§ 201. Insufficient objections to payment of subscription.—One who contracts with a corporation cannot defend himself against a claim on such contract in a suit by the corporation, by alleging irregularity in its organization. The same rule applies in the case of a subscription to the capital stock in an organization which has attempted irregularly to constitute itself a corporation and has acted as such; and also to the increasing of the stock of a corporation when the question arises upon the payment of a subscription for stock forming a part of such increase.³ A person after subscribing for stock in a corporation, and enjoying the privileges of membership, is not in a position to interpose as a defense to an action for assessments, the illegality of the corporate organization.⁴ Where a subscriber was a party to, and co-operated actively with, the other subscribers and the commissioners in the organization of a corporation, accepted the office of director, and by this and other conduct, induced other subscriptions, it was held that he was estopped from denying the rightfulness of such conduct, or his liability on his subscription, on the plea of in-

¹ Cass v. Pittsburg, etc., R.R. Co., 80 Pa. St. 31. Where one sells shares of stock for which the corporation has not yet issued certificates, he will not be obliged to pay assessments subsequently called. In such case, the transfer of the property as between the parties is effected by the bill of sale. Bingham v. Mead, 10 Allen, 245.

² Lexington R.R. Co. v. Staples, 5 Gray, 520; York, etc., R.R. Co. v.

Pratt, 40 Me. 447; Lewey's, etc., P. R. Co. v. Bolton, 48 Id. 451.

³ Chubb v. Upton, 95 U. S. 665, and cases cited; Swartwout v. Mich. Air Line R.R. Co., 24 Mich. 389; Rice v. Rock Island R.R. Co., 21 Ill. 93; Ill. G. T. R.R. Co. v. Cook, 79 Id. 237; Miss., etc., R.R. Co. v. Cross, 20 Ark. 443.

⁴ Hill v. Reed, 16 Barb. 280; Phoenix Warehousing Co. v. Badger, 67 N.Y. 294.

formality in the organization of the corporation.¹ An act provided that when six hundred shares had been subscribed, the commissioners should certify the fact to the governor, who should thereupon incorporate a company "by the name of," etc. On the trial the company admitted that three hundred shares of the subscriptions were fictitious. It was held that as the defendant accepted the charter, acted under it, was one of those who advertised an election for managers, and voted by proxy, he ought not to be heard against the payment of his subscription.² But although when there is a law in force authorizing the organization of corporations, a person who contracts with a corporate body is estopped, in an action on such contract, to deny the existence of the corporation, yet if an organization is completed when there is no law, or an unconstitutional one, authorizing it, the doctrine of estoppel does not apply.³ Illegality or irregularity in the election of directors cannot be pleaded as a defense to an action by the corporation to collect a subscription.⁴ That the officers of a corporation have mismanaged its affairs, or made foolish bargains, will not release subscribers;⁵ nor the mere fact that a railroad has not been, and may never

¹ Danbury, etc., R.R. Co. v. Wilson, 22 Conn. 435. See Graff v. Pittsburgh, etc., R.R. Co., 31 Pa. St. 489; Ohio, etc., R.R. Co. v. McPherson, 35 Mo. 13.

² Centre, etc., T. Co. v. McConaby, 16 Serg. & Rawle, 140. See Com. v. Union Ins. Co., 5 Mass. 230; Clark v. Monongahela Nav. Co., 10 Watts, 364.

³ Brownlee v. Ohio, etc., R.R. Co., 18 Ind. 68. See Hanover Junction, etc., R.R. Co. v. Grubb, 82 Pa. St. 36; Monroe v. Fort Wayne, etc., R.R. Co., 28 Mich. 272; Meth. Epis. Union Church v. Pickett, 19 N. Y. 482.

⁴ Johnson v. Crawfordsville, etc., R.R. Co., 11 Ind. 280; Eakright v. Logansport, etc., R.R. Co., 13 Id. 404; Stein-

metz v. Versailles, etc., T. Co. 57 Id. 457; Eastern P. R. Co. v. Vaughan, 14 N. Y. 546; Cent. P. R. Co. v. Clemens, 16 Mo. 359.

⁵ Chetlain v. Republic Life Ins. Co., 86 Ill. 220; Hornaday v. Ind., etc., R.R. Co., 9 Ind. 263. It is no defense to an action on a *bona fide* subscription, that another subscription was obtained on a secret and fraudulent agreement with the directors. Anderson v. Newcastle, etc., R.R. Co., 12 Ind. 376. A verbal understanding or agreement at the time a subscription is made, cannot constitute a defense to the liability of a subscriber. Dill v. Wabash Valley R.R. Co., 21 Ill. 9.

be, completed.¹ But where the subscriptions to stock were deemed inadequate for the purposes designed, and no measures were taken for upwards of nine years to appoint directors, or to appropriate the fund subscribed, it was held that such of the subscribers as on the faith of the abandonment of the enterprise changed their circumstances and were no longer interested in the object, could not be compelled to pay their subscriptions.² It is not a defense to an action to recover the amount subscribed to the stock of a corporation that no formal certificate has been delivered.³ Failure to pay a deposit on each share subscribed, required by the charter to be paid in order to defray the expenses of the organization, cannot be set up as a defense by a subscriber. In such case, in the absence of a provision that a subscription shall be void for want of such payment, the corporation can waive the requirement, and if the subscriber be admitted to participate in the meetings of the corporation, and in the regulation of its affairs, he cannot afterward disavow his membership or refuse to pay his subscription.⁴

§ 202. Time and mode of payment.—Payment at the time of subscribing is not essential to the validity of the sub-

¹ Smith v. Gower, 2 Duvall, Ky. 17. See Ill. Grand Trunk R.R. Co. v. Cook, 29 Ill. 237.

² Fountain Ferry T. Co. v. Jewell, 8 B. Mon. 140. See McCully v. Pittsburg, etc., R.R. Co., 32 Pa. St. 25; Miller v. Pittsburg, etc., R.R. Co., 40 Id. 237; Gibson v. Columbia, etc., R.R. Co., 18 Ohio St. 396.

³ Smith v. Gower, *supra*.

⁴ Haywood, etc., P. R. Co. v. Bryan, 6 Jones, 82. See Mitchell v. Rome, etc., R.R. Co., 17 Ga. 574; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Ogdensburg, etc., R.R. Co. v. Wolley, 34 How. Pr. 465. The by-laws of a corporation being always under the con-

trol of the majority, a subscriber cannot resist payment on the ground that some regulation which existed at the time he subscribed, and upon the faith of the continuance of which he was alone induced to do so, was afterward abrogated or changed. East Tenn., etc., R.R. Co. v. Gammon, 5 Sneed, 567. In a suit on a subscription the defendant cannot set up as an equitable offset an alleged indebtedness of the corporation to him while his own debt to the corporation remains unpaid, and is more than enough to balance and extinguish his demand as a creditor. Wheeler v. Millar, 90 N. Y. 353.

scription. When payment is a condition precedent to the right to exercise corporate powers, a party who pays afterward at any time before the corporation is organized, will be considered as recognizing his original liability, and can claim his rights as a stockholder.¹ Commissioners appointed by the legislature to receive subscriptions to the capital stock of a corporation are agents, and the act appointing them is in the nature of a power of attorney, under the provisions of which they can exercise a certain discretion. If they are required to receive a given per cent. on the subscriptions before allowing the corporation to organize, and no time is designated for the payment, they may allow a reasonable time; and where the subscriptions are required to be *bona fide*, they have power to determine what is a *bona fide* subscription.² Under the orders of a court having jurisdiction, a receiver has the same power to determine the times of payment and the amount of instalments called in, which the president and directors of the corporation possessed when uncontrolled by the interven-

¹ Beach v. Smith, 28 Barb. 254; 30 N. Y. 116. See Chamberlain v. Painesville, etc., R.R. Co., 15 Ohio St. 225; Wright v. Shelby R.R. Co., 16 B. Mon. 4; Vicksburg R.R. Co. v. McKean, 12 La. Ann. 638; Minneapolis Harvester Works v. Libby, 24 Minn. 327; Excelsior Grain Binder Co. v. Stayner, 25 Hun, 91; Boyd v. Peach Bottom R.R. Co., 90 Pa. St. 169; Fiser v. Miss., etc., R.R. Co., 32 Miss. 359; Piscataqua Ferry Co. v. Jones, 39 N. H. 491. Where the charter of a corporation provided for the calling of a meeting of the stockholders whenever \$100,000 or more (less than the full amount) of the capital stock should have been subscribed, to choose directors and perfect the organization of the corporation, it was held that the words "perfect the organization," referred to the stockholders' meeting, and embraced such

matters as were incidental to the power of choosing directors, and that the directors so chosen, the requisite amount of stock having been subscribed, could proceed to collect payments for stock. New Haven, etc., R.R. Co. v. Chapman, 38 Conn. 56. When the subscription or charter fixes the capital stock at a certain amount divided into shares of a given value each, the capital stock so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares, unless there is a clear provision in the contract to the contrary, or there is a waiver of the condition precedent. Livesey v. Omaha Hotel Co., 5 Neb. 50; Topeka Bridge Co. v. Cummings, 3 Kans. 55.

² Napier v. Poe, 12 Ga. 170.

tion of any court.¹ A promissory note given for shares in a corporation, payment to be made in such manner and proportions, and at such time and place as the corporation shall from time to time require, is a note given for a consideration, and is valid.² The fact that the commissioners accepted the note of a subscriber in lieu of so much money, and in settlement of the sum which was to have been paid by him upon his subscription, gives him no right to repudiate his contract. The note having been received, he is entitled to all the rights he would have had if he had paid the money, and, upon the principle of mutuality, the note must be held to be valid in the hands of the corporation.³ Payment by a note to the commissioners for the sum payable at the time of subscribing, for which a receipt was taken as for so much money, and the report of the commissioners that the subscriber had paid, was held an irregularity which was subsequently waived by the subscriber when he acted by proxy in organizing the corporation.⁴ In New York it was held that although commissioners appointed to take subscriptions to stock and to receive payment of the amount required to be advanced thereon at the time might take an occasional check on such payment as a substitute for the cash, yet that the receiving of checks in a mass because no subscriber had anything but uncurrent money was not in accordance with the purposes of the statute and could not be sustained.⁵ A provision in the statute that where subscriptions to the stock of a railroad company are made previous to the issuing of letters patent no subscriptions shall be valid unless the party making the same pay to the commissioners five dollars on each share subscribed, is not complied with by giving a note for the

¹ Hall v. U. S. Ins. Co., 5 Gill. 484.

⁴ Greenville, etc., R.R. Co. v. Wood-

² Goshen T. Co. v. Hurtin, 9 Johns. sides, 5 Rich. 145.

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⁵ Crocker v. Crane, 21 Wend. 211.

⁸ Vermont Cent. R.R. Co. v. Clayes,
21 Vt. 30.

See People v. Stockton, etc., R.R. Co.,
45 Cal. 306.

amount.¹ Where the statute forbids directors of a corporation to receive a note in payment of an instalment on the stock "actually called in and required to be paid," a note given for a subscription to stock without any evidence that the stock was called in or required to be paid is valid.² If there be no express provision in the charter that the stock shall be paid for in cash, the directors under a power to prescribe the "manner" of payment may direct of what the payment shall consist, whether cash, labor, materials, or valid notes.³ A subscription to a railroad company provided that each subscriber might pay such per cent. of his subscription as he elected, by taking and performing contracts for the grading of the road-bed by bidding off the same at public or private letting. It was held that an action could not be maintained by the company against a defaulting subscriber whose shares were specified to be taken "all in work" until an opportunity had been afforded him to take a labor contract, which, if he failed to do in a reasonable time, his obligation to pay in money became absolute.⁴ A contractor was to be paid partly in stock, pay-

¹ *Boyd v. Peach Bottom R.R. Co.*, 90 Pa. St. 169. Where the charter of a corporation provided that "upon each share of stock subscribed the subscriber is to pay to the commissioners taking the same five dollars, and on non-payment of said instalment the subscription shall be void," it was held that if the subscriber, instead of paying in cash, gave his bond for the amount, it might be that his subscription would be void, but his bond would be good, and he would be liable for the amount of it. *McRae v. Russel*, 12 Ired. 224, PEARSON, J., dissenting. See *Union Turnp. Co. v. Jenkins*, 1 Caines, 381; *Highland Turnp. Co. v. McKean*, 11 Johns. 100; *Hibernia Turnp. Co. v. Henderson*, 8 Serg. & Rawle, 219; *Mitchell v. Rome R.R. Co.*, 17 Ga.

574; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Carlisle v. Saginaw Valley, etc., R.R. Co.*, 27 Mich. 315.

² *Wilmarth v. Crawford*, 10 Wend. 341. It was held in Wisconsin that a railroad company might dispose of its stock to a subscriber upon credit, and, as security, receive from him his note and mortgage, and that a provision in the company's charter that it should not in its corporate capacity hold, purchase, or deal in any land other than that on which the road was located, was not thereby violated. *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, Ib. 334; *Cornell v. Hichens*, Ib. 353.

³ *Clark v. Farrington, supra*.

⁴ *Eppes v. Miss., etc., R.R. Co.*, 35 Ala. 39.

ment to be made from time to time as the work progressed. When the contractor supposed, though erroneously, that he had fulfilled his contract, he demanded payment in full, but the corporation refused to pay for more than it claimed had been performed. It was held that as it was through mistake the work had not been completed, the contractor was in equity entitled to payment *pro rata*, and that as to the stock portion it should be the highest price the stock bore after the suit was commenced and before final judgment; or that if the contractor chose, the court would strike out that portion of the amount reported and require a certificate to be delivered, and if the corporation refused on reasonable request, judgment should be entered for the full amount.¹ When a subscription is payable in materials, if the subscriber refuses to deliver the materials on demand, he is liable to payment in money.² Under a special contract that a subscription is to be paid in materials, the subscriber may pay a portion of it in cash.³ Where stockholders are personally liable for corporate debts to the extent of the balance remaining unpaid on their shares, receipts to the corporation by the vendor of land necessary to carry out its objects given to stockholders for the balances unpaid by them on their shares and which amounts are credited to them on the books of the corporation, are good payments on their stock, though the corporation misjudged as to the value of the land. A resolution adopted by the board of directors repudiating these payments will not bind such of the stockholders as do not assent to it; and, in case of assent, they will be en-

¹ Barker v. Troy, etc., R.R. Co., 27 Vt. 766. In a similar case, after some work had been done for which the contractor was mostly paid in cash, the charter of the corporation was forfeited, and, the work being abandoned, the stock and bonds of the corporation became worthless. It was held that

the contractor was liable to account to the corporation for the profits of the work. Four Mile Valley R.R. Co. v. Bailey, 18 Ohio St. 208.

² Haywood, etc., P. R. Co. v. Bryan, 6 Jones N. C. 82.

³ Pittsburg, etc., R.R. Co. v. Stewart, 41 Pa. St. 54.

titled to avail themselves of a provision in the resolution that those who are unable or neglect to pay an instalment called, in lieu of such payments may return their old certificates and receive new ones to the amount of their actual cash payments.¹ A collateral agreement between a subscriber and the corporation as to the mode of paying his subscription cannot, as between such subscriber and the creditors of the corporation, be set up to the prejudice of creditors.²

§ 203. Collection of subscriptions.—A subscriber to the capital stock of a corporation, which by its charter may require or demand payment of the amount subscribed, has incurred an obligation which may be enforced by any appropriate common law or equitable remedy, and such remedy is not impaired by a further provision for the forfeiture of stock.³ Upon the face of a certificate of stock were

¹ Carr v. La Fevre, 27 Pa. St. 413. An insurance company assigned to some of the directors as security for advances a note given for an instalment on the shares of the company. In an action brought on the note by the assignees for their own benefit, the corporation being at the time insolvent, it was held no defense that the note was improperly assigned to the plaintiffs. Protection Ins. Co. v. Ward, 28 Conn. 409.

² Noble v. Callender, 20 Ohio St. 199; Henry v. Vermillion, etc., R.R. Co., 17 Ohio, 187.

³ Hartford, etc., R.R. Co. v. Kennedy, 12 Conn. 499; Same v. Boorman, Ib. 530; Mann v. Cooke, 20 Id. 178; Troy Turnp. Co. v. McChesney, 21 Wend. 297; Herkimer, etc., Co. v. Small, Ib. 273; 2 Hill, 127; Sagory v. Dubois, 3 Sandf. Ch. 466; Mann v. Pratt, 2 Id. 273; Stokes v. Lebanon, etc., T. Co., 6 Humph. 241; Northern R.R. Co. v. Miller, 10 Barb. 260; Troy, etc., R.R. Co. v. Kerr, 17 Id. 581; Carson v. Arc-

tic Mining Co., 5 Mich. 288; Peoria, etc., R.R. Co. v. Elting, 17 Ill. 429. An action cannot be maintained on a subscription to stock when the terms of the subscription contain no promise to pay, and the charter only authorizes a forfeiture of stock for non-payment. Odd Fellows Hall Co. v. Glazier, 5 Harr. Del. 172. The legal effect of subscribing for stock is to render the subscriber liable to existing remedies for enforcing payment. This comes within the equity of a case of assumpsit for use and occupation on a parol lease, and lies as well in favor of a corporation as of an individual. The general principle of sales, or letting for use, applies as well to corporations in relation to matters which they have a right to sell or let for use as to individuals enjoying the same right. When there is no other specific remedy, the promise will be implied to pay for what is purchased or hired. Essex Bridge Co. v. Tuttle, 2 Vt. 393.

stamped in red ink the words "non-assessable." HUNT, J., said: "The legal effect of this instrument was to make the remaining eighty per cent. payable upon the demand of the company. We see no qualification of this result in the words non-assessable, assuming them to be incorporated into and to form a part of the contract." A promise to take shares of stock imports a promise to pay for them. The same effect results from the acceptance and holding of a certificate.¹ The sale of the property and franchises of a

¹ Upton v. Tribilcock, 91 U. S. 45. Where a party subscribes for a certain number of shares of stock in a corporation, and agrees to pay all assessments thereon, he will be liable for such assessments even though he has sold his shares to another party, unless the corporation assents to the transfer, or by the laches of its officer prevents the assignee from completing the transfer. Middlesex T. Co. v. Locke, 8 Mass. 268. See Buckfield Branch R.R. Co. v. Irish, 39 Me. 44; City Hotel v. Dickinson, 6 Gray, 586; Boston, etc., R.R. Co. v. Wellington, 113 Mass. 79. An action will not lie to recover instalments, unless all the provisions of the charter for requiring payment from stockholders have been complied with. Banet v. Alton, etc., R.R. Co., 13 Ill. 504. Where a subscription paper agrees to pay an agent, naming him, or his order, suit must be brought in the name of the corporation. Gilmore v. Pope, 5 Mass. 491. In an action by a corporation in a United States court, it need not prove its corporate existence where the only plea is the general issue. Union Cement Co. v. Noble, 15 Fed. R. 502. Interest at five per cent. a month, where calls are not promptly paid, is a penalty. Custar v. Titusville, etc., Co., 63 Pa. St. 381. Subscriptions to stock which are not payable until called for, cannot, until due, be set off by the corporation

against an indebtedness of a subscriber, without his consent. Bouton v. Dry Dock, etc., Co., 4 E. D. Smith, 420. The book of subscriptions is *prima facie* evidence that the subscriptions are genuine, or made by persons duly authorized. Where a subscriber was one of the commissioners for receiving subscriptions, was elected one of the managers of the company, and acted as such, it is not competent for him in an action for the non-payment of his subscription to object that a sufficient number of shares had not been subscribed to justify such an election. Rockville, etc., Turnpike Co. v. Van Ness, 2 Cranch, 449. Where, when the charter is accepted and the subscription made, there is a statute in force providing that all acts of incorporation thereafter granted shall at all times be subject to amendment or repeal at "the pleasure of the legislature," a subscriber cannot resist the payment of his subscription on the ground that after he had subscribed the legislature altered the act of incorporation, nor allege that his liability has been increased without his consent. He consented by becoming a member of the corporation. Meadow Dam Co. v. Gray, 30 Me. 547; Pacific R.R. Co. v. Renshaw, 18 Mo. 210. In a suit on a subscription to stock, it is competent to show by oral testimony, in the absence of record

corporation under a decree to satisfy a mortgage, does not pass to the purchaser debts due the corporation, nor destroy the corporate existence of the company so that it cannot bring an action to recover the amount subscribed to its stock.¹ As the liability of stockholders for shares of stock is several and not joint, a joint action for the collection of the amount due on subscriptions cannot be maintained. But when there is an averment of insolvency, and prayer for the settlement of the affairs of the corporation under an order of the proper court to that effect, all of the subscribers may be made parties so as to determine respective rights, liabilities, and cross equities.² The obligations which a subscription imposes on a subscriber being created by the charter, it is not necessary to aver them in a pleading, nor when the subscription is upon a condition to state the condition, but, merely to allege performance.³ Failure to pay the sum required to be paid at the time of subscribing, cannot be relied on by subscribers to exonerate them from liability. It being their duty to pay it, they will not be allowed to take advantage of their own wrong.⁴ Where a party has given his note, secured by a mortgage on real estate, in payment for a subscription to stock, which note with the security the corporation has assigned for a valuable consideration before maturity, payment will be enforced, or a sale of the security be ordered in an action against the maker.⁵

evidence, that the subscription list upon which the defendant's name appeared, was annulled and abandoned, and that another subscription was subsequently opened and made the basis of the organization of the corporation. *Southern Hotel Co. v. Newman*, 30 Mo. 118.

¹ *Smith v. Gower*, 2 Duvall Ky. 17.

² *Herron v. Vance*, 17 Ind. 595.

³ *Henderson, etc., R.R. Co. v. Leavell*, 16 B. Mon. 358.

⁴ *Wight v. Shelby R.R. Co.*, 16 B. Mon. 4. Where a subscriber sued on his subscription was not liable because

he had not paid five dollars a share at the time of subscribing as required by a previous statute, and, while the suit was pending, an act was passed declaring that companies should have the same remedies as if the former act contained no such provision, it was held that this related to actions commenced after the passing of the act. *Ogle v. Somerset T. R. Co.*, 13 Serg. & Rawle, 256.

⁵ *Clark v. Farrington*, 11 Wis. 306. Where by the terms of an agreement a corporation undertakes to pay a cer-

Not only is an original subscriber liable on his subscription while he holds his stock, but a purchaser from him is also bound to pay instalments called for after he has succeeded to the place of his vendor. He takes the stock subject to its liabilities, and being accepted by the corporation as a stockholder, a privity is established between them.¹ In an action against the transferee of stock to recover the amount of two instalments due thereon, it was held that as the transfer of the stock was duly made, the defendant was, in respect to said stock, substituted to all the rights and liabilities which would have attached to his assignor had he continued the owner; that a statute providing that no stockholder indebted to the company should be permitted to transfer his stock until the debt was paid or secured to the satisfaction of the president and board of directors, did not intend to impose a duty, but to confer a privilege upon the company which it might waive; and that instalments not called in did not constitute such indebtedness as was contemplated by the act.²

§ 204. Sale of shares for non-payment of subscription.—Some of the decisions hold that in the absence of an express promise there is no undertaking on the part of a subscriber by which he incurs personal liability to pay any assessment

tain per cent. of a given sum to a contractor, in its capital stock, without specifying any price per share, it is an agreement to pay the amount named in stock according to its market value at the time, the same as though the payment was to be made in any other kind of personal property which has no fixed price. If the party fails to tender the stock when it is due under the contract, and it afterward becomes valueless, or payment in the stock is rendered impossible, the amount is necessarily recoverable in money. *Hart v. Lau-*
man, 29 Barb. 410.

¹ *Huddersfield C. Co. v. Buckley*, 7 Term Rep. 36; *Bend v. Susquehanna Bridge Co.*, 6 Har. & Johns. 128; *Merrimac M. Co. v. Levy*, 54 Pa. St. 227; *Cole v. Ryan*, 52 Barb. 168; *Harvester Works v. Libby*, 24 Minn. 327; *Hartford, etc., R.R. Co. v. Boorman*, 12 Conn. 530; *Merrimac Mining Co. v. Bagley*, 14 Mich. 501; *Moore v. Jones*, 3 Woods, 53; *Pullman v. Upton*, 96 U. S. 328. See *Messersmith v. Sharon Savings Bank*, 96 Pa. St. 440.

² *Hall v. U. S. Ins. Co.*, 5 Gill, 484.

laid on the shares taken by him, the only remedy of the corporation to obtain payment being by a sale of the shares.¹ In Mechanics' Foundry, etc., Co. v. Hall,² GRAY, J., said: "Where a corporation is authorized by law to lay assessments upon shares, and to sell the shares for non-payment, and a subscriber has not expressly promised to pay assessments, no such promise can be implied so as to enable the corporation to maintain an action against him personally for the amount of an assessment or any part thereof, even if the sum received from the sale of his shares has not satisfied the assessment due upon them. Such subscriber may rely on his right to abandon the enterprise if the assessments become burdensome." If by an act of incorporation the shares of a corporation are subject only to sale

¹ See Andover Turnp. Co. v. Gould, 6 Mass. 40; New Bedford, etc., T. Co. v. Adams, 8 Id. 138; Belfast, etc., R.R. Co. v. Moore, 60 Me. 561; Same v. Cottrell, 66 Id. 185; N. H. Cent. R.R. Co. v. Johnson, 30 N. H. (10 Fost.) 390; Connecticut, etc., R.R. Co. v. Bailey, 24 Vt. 465; Chase v. East Tenn., etc., R.R. Co., 5 Lea Tenn. 415. It was said in an early case in Massachusetts that by the act concerning manufacturing corporations, the sale of the shares of those who were delinquent in paying their assessments was the only remedy provided for the corporation. Franklin Glass Co. v. White, 14 Mass. 286. And see to the same effect, Atlantic Cotton Mills Co. v. Abbott, 9 Cush. 423. "A subscription paper stating that the subscribers agree to be assessed in proportion to their subscriptions, is not a promise to pay assessments, but only that assessments may be enforced by a sale of the shares." Chester Glass Co. v. Dewey, 16 Mass. 94. When the statute authorizes the sale of stock of non-paying subscribers, the corporation is not obliged to sell when the first instalment falls due, but

it may wait until all of the instalments remain unpaid. Brockenbrough v. James River, etc., Co., 1 Patton & Heath, Va. 94.

² 121 Mass. 272. It was held in Michigan that as a right of action to recover unpaid instalments exists at common law, the right once existing continued until satisfaction of the demand, and the corporation was entitled to an action for any deficiency remaining after a sale of the stock under the statute, for the non-payment of calls. Carson v. Arctic Mining Co., 5 Mich. 288. CAMPBELL, J., dissenting, said: "Where the subscription is under the charter, contains no promise to pay, and has no action given for it by the charter, and the charter contains an express remedy, I cannot hold that after exhausting the express remedy, any further course remained, or that any remaining liability exists where the relation of stockholder has been terminated." See Small v. Herkimer Manf. Co., 2 Comst. 330; Merrimac Mining Co. v. Bagley, 14 Mich. 501. See Seymour v. Sturgess, 26 N. Y. 134; Wintringham v. Rosenthal, 25 Hun, 580.

for delinquencies, and the original members sign a written obligation to pay all assessments on shares, no action can be maintained on such promise if, before an assessment, the member *bona fide* and for a valuable consideration sells his shares, though he subsequently buys the same shares, and after his repurchase the assessment is made.¹ When a statute prescribes the terms on which shares in the stock of a corporation may be sold for the payment of assessments, and the shareholders be held to pay the balance if such sale does not realize sufficient to pay the assessment, those terms are conditions precedent which must be strictly complied with, otherwise the sale is irregular, and the shareholder is not liable for such difference.² Where a corporation, being authorized by law, increases its capital stock, and offers the newly issued shares to existing stockholders, it may prescribe the terms on which such stock shall be taken. And if a purchaser from stockholders of their right to such additional stock does not comply with the terms indicated, and the corporation sells the shares he would have been entitled to, he cannot, by a subsequent tender of the price and interest, maintain a bill against the corporation for specific performance.³ The power to order a sale of stock for the non-payment of assessments cannot be delegated.⁴

§ 205. Right to forfeit shares.—Unless the power to forfeit

¹ Franklin Glass Co. v. Alexander, 2 N. H. 380. If subscribers have made special promises to pay any designated sum of money, an action may be maintained against them for its recovery. City Hotel v. Dickinson, 6 Gray, 586.

² Portland, etc., R.R. Co. v. Graham, 11 Metc. 1; Lexington, etc., R.R. Co. v. Chandler, 13 Id. 311; Troy, etc., R.R. Co. v. Newton, 1 Gray, 544; Lewey's Island R.R. Co. v. Bolton, 48 Me. 451; Eastern Plank R. Co. v. Vaughan, 20 Barb. 155; Mitchell v. Vermont Mining

Co., 40 N. Y. Super. Ct. 406; 67 N. Y. 280; Johnson v. Alb., etc., R.R. Co., 40 How. Pr. 193; Germantown, etc., R.R. Co. v. Fitler, 60 Pa. St. 124; Occidental, etc., Assoc. v. Sullivan, 62 Cal. 394; Johnson v. Lyttle's Iron Agency, 46 L. J. Eq. 786. See Genl. Sts. of Mass. of 1860, ch. 63, sec. 9.

³ Sewall v. Eastern R.R. Co., 9 Cush. 5.

⁴ York, etc., R.R. Co. v. Ritchie, 40 Me. 425; Farmers', etc., Bank v. Watson, 4 Iowa, 336.

stock for the non-payment of instalments has been expressly conferred, neither the corporation in general meeting by special resolution or otherwise, can forfeit shares.¹ Exercise of the power is a matter of strict right to be employed with due regard to formalities, and under circumstances justifying the forfeiture.² The right of forfeiture belongs exclusively to the corporation.³ Non-payment of an assessment does not *ipso facto* work a forfeiture of stock. A sale to divest the title for such non-payment must be made in strict compliance with the laws of the State under which the corporation is organized, and with the charter and by-laws of the corporation.⁴ A mere announcement by the corporation that the stock will be forfeited, does not constitute a forfeiture. There must be an actual declaration of forfeiture.⁵ A provision in the articles of agreement in a private joint stock company that upon default by a stockholder to pay assessments he shall thereby forfeit all his shares, right, and interest in the association

¹ *In re* Long Island R.R. Co., 19 Wend. 37; Rosenback v. Salt Springs Nat. Bank, 53 Barb. 495; Master Stuedores' Assoc., 2 Daly, 14; Cartan v. Father Mathew, etc., Soc., 3 Id. 20; Downing v. Potts, 23 N. J. 66; Westcott v. Minnesota, etc., Co., 23 Mich. 145; Perrin v. Granger, 30 Vt. 595; Pentz v. Citizens', etc., Co., 35 Md. 73; Barton's Case, 4 De G. & J. 46; Fletcher's Case, 37 L. J. Ch. 49; Clarke v. Hart, 6 H. L. 633. See Lesseps v. Architects' Co., 4 La Ann. 316; Detweiler v. Breckenkamp, 83 Mo. 45. Power to forfeit and sell stock for default in the payment of assessments does not exist at common law, and therefore the remedy is exclusively a statutory one, unless provided for by the charter of the corporation, or by the general laws of the State. Where, therefore, a corporation is not authorized to enforce any such remedy in the

collection of assessments, an action against a defaulting stockholder in which it is attempted to sell the stock for the payment of the debt, is in the nature of a proceeding *in rem*, and the jurisdiction can only be exercised by having the thing in the custody of the law. Williams v. Lowe, 4 Nebraska, 382.

² Green's Brice's Ultra Vires, 2d Edition, 186. Unless the power given to a corporation to forfeit stock be strictly pursued, its attempted exercise will be nugatory. But a forfeiture will not be relieved against in equity, if all of the proceedings have been regular. Germantown Passenger R.R. Co. v. Fitler, 60 Pa. St. 124.

³ Klein v. Alton, etc., R.R. Co., 13 Ill. 514.

⁴ Mitchell v. Vermont C. M. Co., 40 N. Y. Sup. 406.

⁵ Water Valley M. Co. v. Seaman, 53 Miss. 655.

and its property, does not authorize the trustees by a mere declaration to create a forfeiture against which a court of equity will not grant relief. If the articles provide an express mode by which the forfeiture is to be established, and such mode has been pursued, and especially if any rights of property have become vested in consequence thereof in third parties, the case will be different.¹ Under an act of incorporation providing that if a subscriber should fail to pay a call his stock should be sold for the amount of the call, and the purchaser have all the rights, and be subject to all the liabilities of the original owner, it was held that the remedy was only intended to enforce payment of the calls as made, and if the corporation neglected to resort to its remedy at the proper time, it thereby lost the right.² Upon the refusal of a subscriber to pay the assessments, the corporation did not formally declare the shares forfeited, but procured other subscriptions to the full amount of its stock. It was held that the corporation could not sell the shares of the delinquent subscriber, as the sale, if valid, would create additional stock, and that an action would not lie on

¹ Walker v. Ogden, 1 Biss. 287. "As to the circumstances under which a non-observance of formalities will invalidate a forfeiture, there is some doubt. Till quite recently it has been considered first, that the acts of *de facto* directors not questioned at the time, are, here as in other matters, perfectly valid; and secondly, that a substantial observance of formalities, unless immediately taken objection to, is sufficient. But both these points have been rendered questionable by the decision of the privy council in *Garden Gully United Quartz Mining Co. v. McLister*, L. R. 1, App. 39. Here a forfeiture for non-payment of calls by a *de facto* board of directors, acting as such, elected by the corporators, though irregularly elected, without the full

notice requisite to the shareholder, who, however, did not file his bill for relief for nearly six years, was declared invalid. For the respondent it was argued that in order to effect a valid forfeiture of shares for non-payment of a call, the call must have been regularly made by a board of directors who had been duly elected, and the shares after non-payment of the call must have been duly declared to be forfeited by a board of directors who also have been duly elected; and the privy council, though the judgment is not very explicit as to the principles involved, apparently judicially approved of the accuracy of each of these four points." Green's Brice's Ultra Vires, 2d Am. Ed. 187, 188.

² Stokes v. Lebanon, etc., T. Co., 6 Humph. 241.

the original agreement, as the corporation had, by disposing of the whole amount of its capital stock to other parties, disabled itself from fulfilling the contract on its part.¹

When, as is usually the case, the statute provides that the subscriber whose stock is about to be declared forfeited for non-payment, shall be duly notified that such a proceeding is intended, the requirements of the act as to the form and mode of the notice must be strictly observed, otherwise the forfeiture will be void.²

In a general assignment by a corporation for the benefit of creditors, unpaid subscriptions pass to the assignee as part of the assets. The corporate body is not thereby necessarily dissolved; and where the power to issue calls and to forfeit stock for non-payment is vested in the board of managers, the fact that the assignee took no active part in issuing such calls, or in the forfeiture of stock for non-payment, will not relieve a stockholder whose stock has been forfeited.³

§ 206. Nature and effect of the forfeiture of shares.—If subscriptions are taken in the usual form imposing upon the subscribers an undertaking to pay, the affirmative remedy by forfeiture should not be construed to have been in-

¹ Athol, etc., R.R. Co. v. Inhabts. of Prescott, 110 Mass. 213. Where an officer of a bank informed a party applying to it that he might safely loan money on a pledge of the stock to the owner of it as it was unencumbered, it was held that after the loan was made, the bank was estopped to forfeit the stock for alleged dues. Moore v. Bank of Commerce, 52 Mo. 377.

² Lewey's Island R.R. Co. v. Bolton, 48 Me. 451; Johnson v. Lyttle's Iron Agency, 46 L. J. Eq. 786; Watson v. Eales, 23 Beav. 294; Eppes v. Miss., etc., R.R. Co., 35 Ala. 33; Hughes v.

Antietam Manf. Co., 34 Md. 317; Heaston v. Cincinnati, etc., R.R. Co., 16 Ind. 275; Sands v. Sanders, 26 N. Y. 239; Louisville, etc., Turnp. Co. v. Meriwether, 5 B. Mon. 13. See Lexington, etc., R.R. Co. v. Chandler, 13 Metc. 311; Miss., etc., R.R. Co. v. Gaster, 20 Ark. 455.

³ Germantown Passenger R.R. Co. v. Fitler, 60 Pa. St. 124. As to the necessity of the strict observance of the provisions of the chart in relation to the forfeiture and sale of shares, see York, etc., R.R. Co. v. Ritchie, 40 Me. 425.

tended to take away the common law right to enforce payment by action. Forfeiture is given as a cumulative and summary remedy, which may be resorted to by the corporation at its election.¹ The corporation can sue or declare the stock forfeited at its option, and may defer the forfeiture until it has exhausted its remedy by suit. If it brings an action and collects the subscription the subscriber remains a stockholder. If it declares the shares forfeited, the stockholder loses all previous payments, and ceases to be a member of the corporation.² When a corporation sues a subscriber on unpaid instalments, the judgment in the case is conclusive of the amount to be recovered, and upon payment, the subscriber is entitled to a certificate for his stock, even though one or more of the instalments sued for was barred by the statute of limitations. If a corporation would claim a forfeiture of shares, it must specify the particular stock it proposes to forfeit, and so declare to the holder.³ Where notice is given that the stock will be forfeited if the call is not paid, it is a threat,

¹ Gratz v. Redd, 4 B. Mon. 178; Tar River Nav. Co. v. Neal, 1 Hawks, 520; Munn v. Currie, 2 Barb. 294; Renis-selaer, etc., P. R. Co. v. Wetsel, 21 Id. 56; Troy T. Co. v. McChesney, 21 Wend. 296; Klein v. Alton, etc., R.R. Co., 13 Ill. 514; Peoria, etc., Co. v. Elting, 17 Id. 429; Spangler v. Ind., etc., R.R. Co., 21 Id. 276; Hartford, etc., R.R. Co. v. Kennedy, 12 Conn. 499; Kirksey v. Florida, etc., Co., 7 Fla. 23; New Orleans, etc., Co. v. Briggs, 27 La. Ann. 318; Northeast R.R. Co. v. Rodrigues, 10 Rich. 278; Hughes v. Antietam Manf. Co., 34 Md. 317; Boston, etc., R.R. Co. v. Wellington, 113 Mass. 79; Mechanics', etc., Co. v. Hall, 121 Id. 272; Connecticut, etc., Co. v. Bailey, 24 Vt. 465; Piscataqua Ferry Co. v. Jones, 39 N. H. 390; Williams v. Lowe, 4 Nebraska, 382.

² Rutland, etc., R.R. Co. v. Thrall,

35 Vt. 536. Even though the charter was obtained fraudulently, the rights of the corporation cannot be called in question in such an action, for the purpose of declaring its charter void; that can only be done at the instance and on behalf of the government. Selma, etc., R.R. Co. v. Tipton, 5 Ala. 787. An unsuccessful attempt to sell the shares will not extinguish the obligation. Instone v. Frankfort Bridge Co., 2 Bibb. 576.

³ Johnson, etc., v. Albany, etc., R.R. Co., 40 How. Pr. 193. When the charter authorizes the enforcement of a penalty, and, in addition, a forfeiture of shares for the non-payment of instalments, the exercise of the power is discretionary with the corporation, and it may recover on the promise to pay. Delaware, etc., Canal Co. v. Samson, 1 Binn. 70.

and not a forfeiture.¹ An agreement to forfeit stock upon non-payment of instalments is in the nature of a penalty, and does not excuse the party from performing his contract.² When the corporation is solvent, in the absence of an express provision in the charter that upon a forfeiture of shares for the non-payment of calls the delinquent stockholder shall be liable to the corporation for any deficiency, the effect of the forfeiture is to annul the relation of vendor and vendee, and to discharge the subscriber from all existing liability founded on that relation.³ That such ought to be the result is obvious, as the available assets of the company are not thereby impaired, and the party in default, after being deprived of his shares, and consequently of all his interest in the corporate body, should not be compelled to contribute to its capital. In *Carson v. Arctic Mining Co.*,⁴ MARTIN, Ch. J., said : "If it is true that the stock was forfeited to the use of the company upon the failure to pay the assessment, there would perhaps be no difficulty in holding that the remedy by action was taken away thereby, and such is the weight of authority; and when the forfeiture is made an alternative, and not a concurrent remedy, such is most certainly the result. But by forfeiture, in the sense employed in all these cases, and in all others of the same class, is meant the reclamation by the corporation of the entire stock to its own uses, and this result is held to follow upon the principle that such forfeiture necessarily involves a total loss of interest in the thing forfeited by the party in default, and a resumption by the

¹ *Macon, etc., R.R. Co. v. Vason*, 57 Ga. 314.

² *Mason v. Caldwell*, 5 Gilman, 176; *Raymond v. Caton*, 24 Ill. 123.

³ *Small v. Herkimer Manf. Co.*, 2 Comst. 330; *Allen v. Montgomery R.R. Co.*, 11 Ala. 437; *New Alb. R.R. Co. v. Pickens*, 5 Ind. 247; *Athol, etc., R.R. Co. v. Inhabts. of Prescott*, 110

Mass. 213; *Mechanics' Foundry, etc., Co. v. Hall*, 121 Mass. 272; *Ogdensburg, etc., R.R. Co. v. Frost*, 21 Barb. 541; *London & Brighton R.R. Co. v. Fairclough*, 2 Man. & Gr. 674; *Edinburgh R.R. Co. v. Hobelwhite*, 2 M. & W. 715; *Giles v. Hutt*, 3 Exch. 18; *Gt. Northern R.R. v. Kennedy*, 4 Id. 417.

⁴ 5 Mich. 288.

company of the entire consideration of the debtor's promise." The New York Supreme Court held that a forfeiture of stock was but another name for foreclosure, and was not necessarily an extinguishment of the debt; that, in such case, the real cash value of the stock at the time it was declared forfeited should be deducted from the nominal value, and a verdict be rendered for the balance.¹ The Court of Appeals, however, said that the right to forfeit stock and previous payments could not be regarded as a mortgage; that it was more like a conditional sale in which the absolute title did not pass until payment in full; that it was optional with the corporation whether it would bring an action on the subscription or forfeit the stock and previous payments; that if it did the latter, it could not be permitted also to sue and collect the price agreed to be paid or any part of it.² It has been held that a party whose shares have been forfeited is not liable for debts contracted by the corporation, where after forfeiture the corporation becomes insolvent.³ In Georgia it was decided that a subscriber whose shares had been forfeited was not relieved from the payment of a note given by him for the stock, although after the forfeiture there might have been made a material alteration in the charter without his assent.⁴ A corporation, the charter of which provides that the shares of a delinquent subscriber may be forfeited, and that if the shares do not sell for a sum sufficient to pay the assessment, he shall be liable to the corporation for any deficiency, is not, by selling the shares, precluded from maintaining an action for such deficiency.⁵ In a proper case, shares which have been forfeited may be re-

¹ Herkimer Manf. Co. v. Small, 21 Wend. 273; S. C. 2 Hill, 127. Creyke's Case, L. R. 5, Ch. 63; Bridges' Case, 4 Id. 266.

² Small v. Herkimer Manuf. Co., 2 Comst. 330; S. P. Mills v. Stewart, 41 N. Y. 384; 62 Barb. 444. ⁴ Mitchell v. Rome R.R. Co., 17 Ga. 574. *Contra*, Ashton v. Burbank, 2 Dillon, 435.

³ Mills v. Stewart, *supra*; Macawly v. Robinson, 18 La. An. 619. See ⁵ Danbury, etc., R.R. Co. v. Wilson, 22 Conn. 435.

deemed. Where the articles of agreement of a private joint stock company provided that upon the non-payment by a stockholder of his assessments all his shares, right, and interest in the association and its property should be forfeited, it was held on a bill in equity that upon the payment by him of the amount, principal and interest, he would be allowed to redeem, and the trustees be ordered to make and deliver the certificates, especially as he had, with the acquiescence of the trustees, previously given security for the payment of his overdue assessments.¹

§ 207. Collusion in the forfeiture of shares.—The power of forfeiture is a trust to be exercised in good faith for the benefit of the whole corporation and the general body of members, and not in favor or to the detriment of some one or more.² It cannot be employed as a means of punishment or to satisfy feelings of dislike, or to assist members wishing to withdraw from the corporation.³ If stock is forfeited by collusion between a stockholder and the board of directors, he will not be released from liability; as where upon stockholders ceasing to be directors their shares were forfeited;⁴ where directors, in order to induce subscriptions, had taken shares in trust for their own company;⁵ where a dispute was compromised by forfeiting shares which the stockholder contended he was entitled to repudiate for fraud;⁶ where a director took shares upon an understanding that he should not be liable thereon, in order that the company might obtain registration.⁷ The directors must be unable to obtain payment. It is not intended to supply them with means by which, under pretence of for-

¹ Walker v. Ogden, 1 Biss. 287. *Contra*, Sparks v. Liverpool Water Works Co., 13 Ves., Jr., 428. See Smith v. Maine Boys' Tunnel Co., 18 Cal. 111.

² Richmond's Case, 4 K. & J. 305; Sweny v. Smith, L. R. 7, Eq. 324; Green's Brice's Ultra Vires, 2d Am. Ed. 498.

³ Ibid.

⁴ Manisty's Case, 17 S. J. 745.

⁵ Richmond's Case, 4 K. & J. 305.

⁶ Gower's Case, L. R. 6, Eq. 77;

Dixon v. Evans, L. R. 5, H. L. 606.

⁷ Jones, *ex parte*, 27 L. J. Ch. 666.

feiture, they can release a shareholder.¹ "It is clear that the directors of a company organized under the law have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company; its means for performing its duty to the commonwealth and to those who deal with it. Accordingly it has been settled by numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company."² "Directors of a railroad company," said the court in Bedford R.R. Co. v. Bowser,³ "are trustees for all the stockholders, and in a very just sense for the commonwealth. It is an abuse of their trust, wholly unauthorized and at war with the design of the charter, to single out some of the stock subscribers and release them from their liability. No such authority in them has ever been recognized. It is supported neither by authority nor reason."

All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits and subject to the same burdens. In the subscription of each person, every other subscriber has an interest. A private arrangement whereby the issue of certain shares is coupled with the right on the part of the holder to surrender them and take back the money, is in law a fraud upon the other subscribers, and the party will be held to all the responsi-

¹ Stanhope's Case, L. R. 1, Ch. 161; 3 De G. & Sm. 198; Mills v. Stewart, 41 N. Y. 386.

² Burke v. Smith, 16 Wall. 390, per STRONG, J.

³ 48 Pa. St. 37. See Belhaven's Case, 11 Jur. N. S. 572; 3 De G. J. & S. 41; New Albany v. Burke, 11 Wall. 96; Putnam v. New Albany, 4 Biss. 365.

bilities of a *bona fide* subscriber. Certificates of stock issued in the usual form, and so appearing upon the books of the corporation, unaccompanied by any condition, are evidence of the right in the stock. Upon this proof others are entitled to rely as to the character of the stock, and they are not bound to take notice of an antecedent individual contract existing between the directors of the corporation and a taker of the shares.¹

§ 208. Rights of creditors in relation to unpaid subscriptions.—The capital stock of a corporation is a trust fund for the protection of its creditors or those who deal with it; and the stock thus held in trust is the whole stock, and not merely that percentage of it which has been called in and paid.² “To the community it announces the extent of the means contributed, and forming the basis of the dealings of the corporate body, and enables every man to judge of its ability to meet its engagements and perform what it undertakes. And when, as in most instances, the statute

¹ Miller v. Hanover, etc., R.R. Co., 87 Pa. St. 95; Melvin v. Lamar Ins. Co., 80 Ill. 446; Blodgett v. Morrill, 20 Vt. 509; White Mts. R.R. Co. v. Eastman, 34 N. H. 124; Bates v. Lewis, 3 Ohio St. 459.

² Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, Ib. 65. See Fort Edward P. R. Co. v. Payne, 17 Barb. 567; Kennebec, etc., R.R. Co. v. Kendall, 31 Me. 470. In Wood v. Dummer, 3 Mason, 308, Judge STORY, in speaking of the capital stock of banks, said: “During the existence of the corporation it is the sole property of the corporation, and can be applied only according to the charter; that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why otherwise is any capital stock required by our charters? If the stock may, the next day after it

is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point seems so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of the profits made by the establishment, and cannot take any portion of the fund until all other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid.”

requires the stock to be paid in before the corporation can transact business, security to those contracting with it is thereby superadded to the information of its resources. These objects for the public benefit are sometimes defeated by fraud and deception, but they are such as the legislature have in view in limiting the amount of the capital stock, and requiring a specified sum or proportion to be paid in."¹

"The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund pledged for the payment of the debts of the corporation. Until they are paid the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are extinguished. This is as true of the unpaid shares subscribed, or balances due thereon, as of the amount which has actually been paid in. Such unpaid shares or balances are as much a part of the capital stock as the sums which have already been realized thereon. Aside from the funds on hand, they often constitute the only resources of the company. They are debts due to it, the payment of which can be enforced by its officers. The delinquent subscribers are its debtors, and the directors are clothed with authority to compel them to pay. When the company is indebted,

¹ SANDFORD, V. C., in *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280. Unpaid subscriptions to the capital stock of a corporation are corporate property, and can be reached by creditors of the corporation in a court of equity. The right exists independently of any statutory provision, the stock, as well as the other property of the corporation, constituting a trust fund for

all of the corporate debts. Hightower v. Thornton, 8 Ga. 486. If the directors of a corporation, whose duty it is to call in and collect subscriptions, neglect to do so, creditors may file a bill in equity, and compel assessments on unpaid stock necessary to satisfy their claims. *Glenn v. Semple*, Cent. L. J. for Feb. 19, 1886, vol. 22, p. 182.

and other means of meeting its liabilities are exhausted, the exercise of this authority becomes a duty which they are under the highest moral obligation to perform. Creditors are supposed to have trusted as well to such unpaid subscriptions, and to the fair and faithful exercise of such compulsory power for their payment, as to the funds actually paid in ; and when it becomes necessary to their security or satisfaction, they have a legal right, either by the voluntary action of the proper officers, or through the aid of the courts, to such exercise of it. If, therefore, by the wilful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties, a court of equity will, on proper application, afford the requisite relief."¹

¹ DIXON, C. J., in *Adler v. Milwaukee Patent Brick Manf. Co.*, 13 Wis. 57; *Burke v. Smith*, 16 Wall. 395; *Bedford R.R. Co. v. Bowser*, 48 Pa. St. 37; *Alford v. Miller*, 32 Conn. 543; *Jones v. Terre Haute, etc.*, R.R. Co., 57 N. Y. 196; *Crawford v. Rohrer*, 59 Md. 599; *Rider v. Morrison*, 54 Id. 429. In *Marsh v. Burroughs*, 1 Woods C.C. 463, it was contended that the unpaid subscriptions of capital stock were not assets for the payment of debts, either legal or equitable ; that they existed as mere possibilities ; that they were not a debt due, having never been called in ; that no one could call them in but the directors, with whom the power was discretionary ; and that unpaid subscriptions were no part of the capital stock of a bank, the capital being what had been called in. It was held, however, not a mere power vested in the bank to make further calls, but a right, and that where a debtor had such a right, and did not choose to exercise it, equity, at the instance of creditors, would exercise it for him ; that it was not only the right of the bank to call in a subscription, but the right of the

stockholder to pay it at any time ; and that such a right could not therefore be properly described as a mere discretionary power on the part of the bank. See *Hatch v. Dana*, 101 U. S. 205.

Where the mode of closing up the affairs of insolvent corporations, and of distributing the proceeds of their property and effects among their creditors, is governed by the common law, the creditor must first establish his claim by judgment at law, and then after execution issued and returned in whole or in part unsatisfied, he may file his bill in his own behalf, and in behalf of such other creditors of the corporation as may elect to become parties, against the corporation and its delinquent or withdrawing stockholders, alleging the recovery and non-payment of his judgment, and praying the decree or order of the court that an account of the assets and debts be taken and a receiver be appointed, and that the stockholders and officers pay in and account to the receiver for so much of the capital stock as will be sufficient to pay the debt of the plaintiff and of those of such other creditors as may choose to

Stockholders cannot divert the capital stock from the payment of debts contracted upon the faith of it as a trust fund. Where the corporation is insolvent, and the capital stock insufficient for the payment of the corporate debts, a

join him and come in under the decree; and that the receiver be directed to apply the same in discharge of such indebtedness. All of the creditors should be joined, that all may share alike in the funds which are realized by the proceedings. So, all of the stockholders should be made parties, so that no one of them may be compelled to pay more than his due proportion, and that all may be obliged, according to the number of their respective shares and their pecuniary ability, to contribute toward the losses which the corporation may have sustained. *Vick v. Lane, etc., Co.*, 56 Miss. 681. See *Marsh v. Burroughs*, 1 Woods, C. C. 463. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is out of its unpaid stock, the complainant is not obliged to make all of the stockholders defendants, to marshal the assets, or to adjust the equities between the corporators. "At law, certainly, a subscription may be enforced against a subscriber without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of the corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens and in order to prevent a multiplicity of suits. But this is no such case. The

most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary." *Hatch v. Dana*, 101 U. S. 205, per STRONG, J. In *Ogilvie v. Knox Ins. Co.*, 22 How. 380, GRIER, J., in delivering the opinion of the court, said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, corporators, or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver with authority to collect and receive all the debts due to the company, and administer all its assets. In that way, all the other stockholders or debtors may be made to contribute." The Supreme Court of Illinois has frequently held that an action at law by a single creditor will lie against a stockholder of an insolvent corporation to enforce an individual liability created by its charter; but not that one creditor might not at the instance of the whole body of the other creditors, be restrained from the prosecution of his individual suit, when its prosecution would be prejudicial to the equal interest of all the creditors.

case might be made in which a court of equity would enjoin the payment of future dividends to the stockholders until the debts were paid.¹ Creditors may, before proceeding to

Eames v. Doris, 102 Ill. 350, and cases cited. See City of Chicago v. Hall, 103 Ill. 342; Diversey v. Smith, Ib. 378; Gridley v. Barnes, Ib. 211. In New Hampshire, where the property of a corporation had been divided among its stockholders before all of its debts were paid, it was held that a judgment creditor might, after the return of an execution unsatisfied, maintain an action in the nature of a creditor's bill against a stockholder to reach what was so received by him, and that the plaintiff need not make all of the stockholders parties to the action. Bartlett v. Drew, 57 N. H. 587. And see Pierce v. Milwaukee Construction Co., 38 Wis. 253. In Pennsylvania, the remedy against members is by execution under the statute, and not in equity. By the act of 1849 the liability is to be enforced against those only who are made parties to the creditors' suit, and against whom judgment is obtained. The collection is then specifically to be made by execution against the corporation, and for want of goods, etc., against the stockholders defendants in the judgment. Brigham v. Wellersburg Coal Co., 47 Pa. St. 43.

¹ Reid v. Etonton Manf. Co., 40 Ga. 98. The stockholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it, they cannot occupy the status of innocent purchasers, but they are to all intents and purposes privies to the trust. When therefore they have in their hands any of this trust fund, they hold it *cum onere* subject to all the equities which attach to it. Clapp v. Peterson, 104 Ill. 26. The balance unpaid on the subscription to the stock of a railroad company is a

claim or thing in action subject to sequestration proceedings taken on a judgment against the company. It is like a freight bill due the company, or any other legal or equitable claim or demand; and the fact that the company was afterward adjudged insolvent, does not change the character of the claim, or deprive the judgment creditor of his right. It is not covered by a mortgage purporting to convey "the railroad constructed and to be constructed, and all rights of way, machinery, implements, and other chattels and things pertaining to said railroad, and all its chartered rights, privileges, and franchises, and also all the estate, right, title, interest, property and possession, claims and demands whatsoever of the said railroad of, in, and to the same, with the appurtenances." Dean v. Biggs, 25 Hun, 122. By the phrase "capital stock" is meant the amount of capital contributed by the stockholders for the purposes of the corporation. The value of the stock may be increased by surplus profits, or be diminished by losses, but the amount of the capital stock remains the same. The funds of the corporation may fluctuate. Its capital stock remains invariable, save by legislative enactment. State v. Morristown Fire Assoc., 23 N. J. (3 Zab.) 195. It is the amount fixed by the members as their stake in the concern. Upon this they get credit and transact business. It may not all be actually paid in, still they are liable to the public for the amount thus fixed. On the other hand, additions may be made to the original stock by a successful prosecution of the business; still these profits do not constitute the capital. Hightower v. Thornton, 8 Ga. 500. See

judgment and execution, file a bill against the corporation and the assignee to prevent a misapplication of the trust fund, and the court may appoint a receiver, or require security.¹ But, in the absence of a provision to the contrary, a corporation not bankrupt may deal with its property as it pleases.² In Mills v. Northern R.R. Co.,³ HATHERLY, L. C., said : "So far as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company ; no engagement is taken from them by way of security ; no debenture or mortgage is granted by them ; but the work is done simply on the credit of the company. The only remedy for the creditor in that case is to obtain his judgment and take out execution ; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say : 'Certain transactions are taking place within the company and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed to see whether or not they are doing what is *ultra vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security

Burrall v. Bushwick R.R. Co., 75 N. Y. 211.

¹ Conro v. Gray, 4 How. Pr. 165.

² Hort's Case, 1 Ch. D. 307; Cocker's Case, 3 Id. 2.

³ L. R. 5, Ch. 621. In Pond v. Framingham, etc., R.R. Co., 130 Mass. 194, the substantial allegations of a bill in equity were that the plaintiffs were creditors of a corporation ; that the corporation was insolvent ; that all of its property was mortgaged to trustees for the benefit of one class of creditors ; that it owed large amounts to other creditors, one of whom had attached all of its property ; that it was about to

give a lease to the attaching creditor for a long term at a rent which would not pay the interest on its indebtedness ; and that the giving of the lease would be injurious to the interest of the corporate creditors and stockholders. The prayer was for an injunction to restrain the corporation from the further prosecution of its business, and for the appointment of a receiver. It was held that nothing was alleged which brought the case within the general equity powers of a court of chancery. See Treadwell v. Salisbury Manuf. Co., 7 Gray, 393.

for the payment of my debt whensover the time arrives for its payment.' . . . I have never before heard (and I asked in vain for any such precedent) of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course it would apply not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company."

A creditor of a corporation may, in ordinary cases, treat the unpaid balance of stock as a debt due the corporation and proceed to subject it under the statute as he would any other debt.¹ If the holder of shares has only paid a percentage of his subscription, the creditors of the corporation are entitled to require him to pay the balance; the acceptance and holding of a certificate of stock making him re-

¹ Henry v. Vermillion, etc., R.R. Co., 17 Ohio, 187; Mann v. Pentz, 3 Comst. 415, reversing S. C. 2 Sandf. Ch. 257. The charter of a manufacturing company provided that the persons and property of the members should at all times be liable for all debts due by the corporation. In an action by a bank against the stockholders of the company for borrowed money, the question to be determined was whether members who ceased to be such before the insolvency of the corporation, or the commencement of the plaintiff's action, were liable. On the part of the plain-

tiffs it was contended that those members who were such at the time of the accruing of any debt against the company, whether payable on demand or at a future time, were jointly liable without reference to the solvency or insolvency of the corporation, and that this liability was not discharged or at all affected by ceasing to be members. It was held, however, that those only were liable who were members when a legal demand was made, or, in other words, when a suit was brought against the company. Middletown Bank v. Magill, 5 Conn. 28.

sponsible as a shareholder. An alleged representation by the agent of the corporation that the stock was non-assessable would be immaterial.¹ Where a corporation may, by stipulation, preclude itself from enforcing payment of the full amount subscribed, creditors of the corporation cannot be thereby affected; and though the shares have been transferred to the corporation, that will not be sufficient to discharge the subscriber from the claims of a receiver who is the representative of the creditors.² A private arrangement between the corporation and a subscriber by which he is released from indebtedness on his subscription, or the nature or binding force of it changed, will be void as to creditors.³ In England an agreement between a cor-

¹ Upton v. Tribilcock, *supra*; Birmingham v. Mead, 10 Allen, 245; Buffalo, etc., R.R. Co. v. Douglass, 14 N. Y. 336; Seymour v. Sturgess, 26 Id. 134; Ogilvie v. Knox Ins. Co., 22 How. 380; United Soc. v. Eagle Bank, 7 Conn. 456; Bishops Fund v. Eagle Bank, Ib. 476.

² Mann v. Cooke, 20 Conn. 178. Where a person has become a stockholder, no misconduct of the corporation, or false representation made by it to induce him to take shares, will release him from his statutory liability for the debts of the corporation. He may demand back what he gave for his stock, be reimbursed for any loss or damage he has sustained, and be relieved thereafter from any further liability as a corporator. But as long as he continues to be a stockholder, his liability to creditors continues. Spear v. Crawford, 14 Wend. 24; Matter of Reciprocity Bank, 22 N. Y. 17; Ruggles v. Brock, 6 Hun, 164; Briggs v. Cornwell, 9 Daly, 436; Matter of Empire City Bank, 6 Abb. Pr. 402; Turner v. Granger's Life and Health Ins. Co., 65 Ga. 649; 38 Am. R. 801; Henderson v. Royal British Bank, 7 El. &

Bl. 356; Powis v. Harding, 1 Com. B. N. S. 533; Ellis v. Schmoeck, 5 Bing. 521. The stockholders of California mining corporations, as they are usually formed in that State, by the acceptance of stock incur no liability *ex contractu*, either express or implied, to pay in either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares. Unless they have subscribed for stock, or are successors of subscribers, assessments levied on them can be enforced only by the sale of the shares. *In re South Mountain Consolidated Mining Co.*, 7 Sawyer C. C. 30.

³ Jewell v. Rock River Paper Co., 101 Ill. 57; Chouteau Ins. Co. v. Floyd, 74 Mo. 286. After the organization of the corporation and the transaction of corporate business, as against corporate creditors, subscriptions to the capital stock cannot be qualified by a private understanding among subscribers, that the subscriptions shall not be collected unless a certain amount is subscribed. Hickling v. Wilson, 104 Ill. 54. In Wisconsin the statute of 1878, sec. 1753, as amended by ch. 93, laws of

poration and subscribers to its stock that upon payment of a certain percentage on the par value of it, no further assessments shall be made thereon, and certificates for full paid shares be issued to the holders, is binding not only upon the corporation, but upon creditors. The doctrine in this country is, that such a contract, though binding on the corporation, is a fraud in law on its creditors which they can set aside ; and that when their rights intervene and their claims are to be satisfied, the stockholders can be compelled to pay their stock in full ; that as the public has no means of knowing the private contracts made between a corporation and its stockholders, creditors are entitled to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at their instance require it to be paid.¹ In Sawyer v.

1881, provides that no corporation shall issue any stock or certificate of stock except in consideration of money, or labor, or property estimated at its true money value actually received by it equal to the par value. It was held that a subscriber for stock under the foregoing act at less than its par value was *in pari delicto* with the corporation, and could not maintain an action upon the contract, or recover back money paid under it. Clarke v. Lincoln Lumber Co., 59 Wis. 655.

¹ Waterhouse v. Jamieson, L. R. 2, H. L. 29; Currie's Case, 3 De G. J. & S. 367; Carling, etc., Case, 1 Ch. D. 115; Scovill v. Thayer, 105 U. S. 143; Agricultural Bank v. Wilson, 24 Me. 273; Currier v. Lebanon Slate Co., 56 N. H. 262; Gill v. Balis, 72 Mo. 424; Clarke v. Lincoln Lumber Co., 59 Wis. 659; Osgood v. King, 42 Iowa, 478; Crawford v. Rohrer, 59 Md. 599; Zirkel v. Joliet Opera House Co., 79 Ill. 334. See Matter of South Mt. Consolidated Manf. Co., 14 Fed. Rep. 347; Boynton v. Hatch, 47 N. Y. 225. A

railroad company had undertaken to build its road from the city of N. to the city of S. and had commenced the work relying mainly upon the bonds of the former city to raise the necessary money, in which it had been disappointed. Suits had been commenced for injunctions to restrain the collection of a tax for paying interest, and the consequence was that the bonds could not be sold without a ruinous sacrifice, if sold at all. The company had borrowed thirty-six thousand dollars, pledging the bonds to the amount of eighty thousand dollars as collateral security. The loan had fallen due, and the holders were demanding payment and threatening to sell the collaterals. The city had paid its bonds to the extent of \$200,000 on the subscription, and was liable to be called upon for \$50,000 more. The credit of the bonds it had issued was gone, and if it had issued the remainder, they could only have sold at a great sacrifice. The bonds were negotiable instruments payable to bearer in not less than ten,

Hoag,¹ the charter authorized the corporation to commence business with a capital stock of \$100,000 with ten thousand dollars paid in, and the balance secured by notes with mortgages on real estate or otherwise. The corporation gave a subscriber its check for the amount of his subscription less the instalment required to be paid by each stockholder in cash, for which he gave his note with security. It was agreed that this transaction should be called a loan, and it was so treated by the corporation on its books; in other words, it was an arrangement for the conversion of the stock debt into a loan of money by which the former was extinguished. MILLER, J., in delivering the opinion of the court, said: "Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company as a corporate body could deny that the

nor more than twenty years. The available means of the company were exhausted, and it could neither go on with its work, nor in any manner relieve itself. The bonds pledged, together with those still held by the company, would not have sold for enough to have paid the thirty-six thousand dollars borrowed. It was under these circumstances that, in 1837, an arrangement was made by which the city assumed to pay the \$36,000 due by the company, and sundry other debts, and in consideration obtained from the company one hundred and ninety-three bonds which had not been negotiated, and a cancellation of the stock subscription. In 1858 an execution on

a judgment against the company was returned unsatisfied, and ten years afterward the judgment creditor filed a bill against the city alleging that the compromise was illegal, and praying that so much of the subscription owed by the city as would pay the judgment should be applied. It was held that the transaction between the city and the company was valid, and that, conceding that it might have been set aside at the instance of the creditors of the company, the laches of the complainant was fatal to the bill. New Albany v. Burke, 11 Wall. 96, reversing Putnam v. New Albany, 4 Biss. 365; S. C. Burke v. Smith, 16 Wall. 390.

¹ 17 Wall. 622.

stock was paid in full. . . . In the case before us, the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same, if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction, which forbids it to be treated as a valid payment. It is the change of the character of the debt, from one of a stock subscription unpaid, to that of a loan of money. The debt ceases by this operation, if effectual, to be a trust fund to which the creditors can look, and becomes ordinary assets with which the directors may deal as they choose."¹

As against creditors, the indebtedness of a corporation to its subscribers cannot in general be set off against their subscriptions.² It has been held that if the defendant has

¹ HUNT, J., dissenting. "Payment of assessments will estop an unregistered transferee of shares from denying his liability as a shareholder. Serving as a director, or voting at stockholders' meetings, will have the same effect. The acceptance of an assignment of a certificate in blank will fix the liability as stockholder. Nor can the corporation release the stockholder from his liability so far as creditors are concerned; nor can it accept any other payment than money, unless full value be given. The fact that the company may forfeit and sell the shares of a delinquent stockholder does not impair the rights of a creditor against him.

These principles apply to all cases where an obligation has been created or incurred on the part of the stockholder to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *chose in action* or equitable assets of the corporation." HOFFMAN, J. *In re South Mountain Consolidated Mining Co.*, 7 Sawyer C. C. 30.

² *In re Glen Iron Works*, 13 Phila. 479; *Osgood v. Ogden*, 4 Keyes, 70;

paid debts of the corporation, or advanced money to it for the payment of its debts, or incurred obligations for it to the amount of his stock, it will constitute a defense; on the assumption that, upon an equitable construction of the statute, it could not have been the design of the framers of it that a stockholder who was a creditor of the corporation to the full amount of his stock should be individually liable to another creditor standing on the same ground.¹ But if a mutual insurance company is insolvent, the loss of a member cannot be set off to an action brought by the company on his premium note, as the permitting it to be done would give an unjust preference to one creditor over the others.² A stockholder in an insolvent corporation is lia-

In re Empire City Bank, 18 N. Y. 199; *Lawrence v. Nelson*, 21 Id. 157; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Thebus v. Smiley*, 110 Ill. 316; *Scammon v. Kimball*, 92 U. S. 362; *Scovill v. Thayer*, 105 Id. 143. See *Whitman v. Porter*, 107 Mass. 522; *Garrison v. Howe*, 17 N. Y. 458; *Agate v. Sands*, 73 Id. 620; *Wheeler v. Millar*, 90 Id. 353.

¹ *Agate v. Sands*, 8 Daly, 66; *Briggs v. Cornwell*, 9 Id. 436; *Mathez v. Neidig*, 72 N. Y. 100. See *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 389; *Briggs v. Penniman*, 8 Cowen, 392; *Garrison v. Howe*, 17 N. Y. 458.

² *Hillier v. Alleghany Mut. Ins. Co.*, 3 Barr. 370; *Lawrence v. Nelson*, 21 N. Y. 158. See *Pondville Co. v. Clark*, 25 Conn. 97. The holder of unauthorized stock cannot set off the money paid thereon in a suit by the assignee of an insolvent corporation against his liability for an assessment on his valid stock in the corporation, the unpaid balance due on his valid stock being a trust fund devoted to the payment of all of the creditors of the company. *Scovill v. Thayer*, 105 U. S. 143.

Woods, J.: "When he paid in his money on the void stock, he knew that he was not paying it on the valid stock, and he is presumed to have known that it was not a good payment on the valid stock. The company had no right to apply it on the valid stock without his direction. He never directed such application, and it remained in the possession of the company until the rights of the assignees in bankruptcy attached. To say that it was a contribution to the trust fund devoted to the payment of the creditors of the company is an entire misapprehension. It could not be such contribution unless it were a payment on the stock, and this we have seen was not the case. No call had been made for payment on the valid stock to which the amounts paid on the void stock could be said to apply. No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors, and it does not appear that when the payments were made the company had any creditors. It was a voluntary payment for the benefit of the company, and tended to increase the value of the authorized stock. In that way the

ble to the creditors, although the corporation issue shares to him as collateral security for borrowed money ; creditors not being obliged to seek the equitable owner against whom to enforce their claim, but having the right to proceed against the party who has the legal title.¹ The directors of a corporation will not be permitted to apply the assets to exonerate themselves and thereby sacrifice the interests of the other creditors.² Where a board of directors of an insolvent corporation, more than six months before proceedings in bankruptcy against the corporation, transferred by vote to a firm of which one of the directors was a member the assets of the corporation in payment of a debt due the firm from the corporation, it was held that the transaction was void as to the other creditors. The issue presented was whether the managing officers of an insolvent corporation sustained such a relation of trust to the corporate funds for the benefit of creditors, that they were guilty of a breach of trust in securing an advantage to themselves not common to the other creditors, and in providing for the payment of a debt due a director from the assets of the corporation to the exclusion of the payment of all other corporate debts. The court said : "The vast increase of corporate property and the immense accumulation of corporate liabilities at the present time, and the consequent dependence of both stockholders and creditors upon the fidelity with which the managers of these corporations exercise the powers of their trust, would seem to

stockholder got the benefit of it. There is no rule of law or equity which entitles him, in a contest between him and a creditor of the company, either to receive a credit for it on his unpaid stock or to have it repaid to him *pro rata* out of the assets of the company."

¹ *Wheelock v. Kost*, 77 Ill. 296; *Holyoke Bank v. Burnham*, 11 Cush.

783; *In re Empire City Bank*, 18 N. Y. 223; *In re Reciprocity Bank*, 22 Id. 17; *Pullman v. Upton*, 96 U. S. 328; Case of the Royal Bank of India, L. R. 7, Eq. 91. See *Williams Case*, L. R. 1, Ch. D. 576; *Sickel's Case*, L. R. 3, Ch. 119; *Cox's Case*, 4 De G. J. & S. 53.

² *Richards v. N. H. Ins. Co.*, 43 N. H. 263.

imperatively require that the salutary rules so rigidly enforced by courts of equity in other cases of fiduciary relation should not be relaxed in this class of cases where the trust powers are of such magnitude and the consequences of a breach of trust so disastrous. Especially in the case of insolvent corporations are the acts of the managing officers to be free from the imputation of having been influenced by the consideration of any interests adverse to those they are bound only to regard."¹ In *Drury v. Cross*,³ the directors of a railroad company had secured with the property of the corporation their indebtedness as indorsers, by which the other creditors were deprived of all means of obtaining payment. The court said: "The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of the railroad corporation was very discreditable, and without au-

¹ *Bradley v. Farwell*, 1 Holmes C. C. 433, per SHAPLEY, J. So far as the stockholders are concerned, they have a right to be present at the stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the corporation becomes insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. A stockholder is ordinarily entitled to a certificate for his stock, to a transfer of it on the books of the corporation, and to inspect these books. For an invasion of these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case. *Forbes v. Memphis, etc., R.R. Co.*, 2 Woods, 323, per BRADLEY, J. The possession of capital stock does not give a person any legal interest in the property of the corporation. Though he possesses one-half of the entire

stock, he is not therefore one-half owner of the corporate property, but the whole of it is owned by the corporation. Possession of the stock merely entitles the holder to the incidental right to vote, a right of dividend, and a right to the faithful appropriation of the funds. It is these rights which give value to the stock of a marketable commodity. *Morgan v. Railroad Company*, 1 Id. 15. When an action is brought in the name of a bank, the stockholders, however few in number, are not parties to the action, nor is it for their immediate benefit that it is prosecuted. They have no immediate personal right to the moneys sought to be recovered, but in all cases such moneys belong to the bank as a corporation, and the interest of the stockholders is future and contingent. See *N. Y. & Va. State Stock Bank v. Gibson*, 6 Duer, 574.

² 7 Wall. 299.

thority of law. It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and, in securing an advantage to themselves not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management with absolute fidelity to both creditors and stockholders, they nevertheless acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed.”¹

A corporation, unless restrained by its charter or by statute, has the same right to prefer one creditor to another in the distribution of its property as an individual, and it may execute a mortgage, or give a lien which shall operate as a preference.² This doctrine, though recognized both in courts of law and equity, is in derogation of the rule that the assets of an insolvent corporation constitute a trust fund to which creditors are entitled to look for the liquidation of their demands, and has often been regretted as wrong in principle and calculated to work injustice. In *Robins v. Embry*³ the Chancellor said : “ If I were free from the au-

¹ And see *Koehler v. Black River Falls Co.*, 2 Black. 720. Where the directors of a corporation agree among themselves to take stock and pay for it by their notes, and, after the corporation has become embarrassed, one of the solvent directors transfers his stock to an irresponsible person, substituting the note of the transferee for his own, he is not thereby discharged from his liability to the creditors of the corporation to the amount unpaid on his subscription. *Nathan v. Whitlock*, 9 Paige Ch. 152.

² *Catlin v. Eagle Bank*, 6 Conn. 233; *Savings Bank v. Bates*, 8 Id. 505; *Dana v. Bank of U. S.*, 5 Watts & Serg. 223; *Barings v. Dabney*, 19 Wall. 1; *Smith*

v. Skeary, 47 Mich. 47; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Planters' Bank v. Whittle*, 78 Va. 737; *Buell v. Buckingham*, 16 Iowa, 284; *Ringo v. Biscoe*, 13 Ark. 563; *Whitwell v. Warner*, 20 Vt. 425; *Dabney v. Bank of South Carolina*, 3 S. C. 124; *Coats v. Donnell*, 94 N. Y. 168. See *State Bank v. Maryland*, 6 Gill & Johns. 205. See *Lexington Life Ins. Co. v. Page*, 17 B. Mon. 412.

³ *1 Sim. & Marsh*, Ch. 207. See *Richards v. N. H. Ins. Co.*, 43 N. H. 263; *Hightower v. Mustian*, 8 Ga. 506; *Marr v. Bank of West Tennessee*, 4 Coldw. 471. The governor of New York in recent messages to the legislature has recommended an amend-

thority of adjudged cases, I should be inclined to declare that the property of a banking corporation must be regarded as a trust fund for the equal benefit of all its creditors; and that no preference could therefore be given to any creditor or class of creditors. . . . It is admitted that where property is conveyed by a private individual for the payment of debts generally, no preference can be given to one creditor over another; that the fund so conveyed constitutes equitable assets, and must be distributed ratably among all the creditors. If a fund becomes pledged by operation of law for the payment of debts generally, it is difficult to see why the same principle of equality should not be preserved in its distribution with that which it is admitted must obtain where the trust is created by the express appointment of the grantor. The ground upon which all the cases place the right of a private debtor to prefer one of his creditors to another is his absolute dominion over his own property, and his unrestricted right of alienation. This reason has no application to a mere corporation. They have neither the absolute right in the property itself, nor the unrestricted right of alienation. They hold in the right of others, and to particular uses. The right of alienation is therefore necessarily restricted to the uses to which the property is legally devoted. If then the reason which applies in the one case does not apply to the other, so neither does the law which follows it. I think this right of giving preferences, so liable to abuse, so capable of being used for fraudulent

ment to the general assignment act of the State for the purpose of preventing an inequitable distribution of the debtor's property. In his last message, Jan., 1887, he says: "These evils can be cured in a measure, at least, by limiting the preferences which a debtor has the right to make, to a certain portion of the assigned estate, or forbidding them altogether except in the sin-

gle instance of wages of employés. The preferences (other than the exception mentioned), which are now by the policy of the law allowed to be made, are a fruitful source of litigation, and the occasion of much injustice. The power being subject to great abuse, it should either be properly restricted, or entirely abrogated."

purposes, and so opposed to the spirit of equal justice, has been already carried as far as the spirit of an enlightened jurisprudence can sanction. . . . The cases referred to which sustain the right of a corporation to create such a preference, say that there is nothing in the charters to prevent it. I answer that there is nothing in the charters which grants it, and that the courts will not by construction imply a power not necessary to the ends of its institution which it is admitted may be productive of both fraud and injustice. Public policy and the principles of justice require that the property of a debtor shall be equally devoted to the payment of his creditors where the rule can be enforced without infringing upon the laws of private property. No such infraction is involved in applying the principle to corporations." In New York, it is provided by law that "no conveyance, assignment, or transfer, nor any payment made, judgment suffered, lien created, or security given, by any moneyed corporation when insolvent or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving by means of any such conveyance, assignment, transfer, lien, security, or payment, any of the effects of the corporation shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require; and whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company directly or indirectly, for the payment of any debt; and every such transfer and assignment to such officer or stockholder shall be utterly void."¹ Payment in the usual course of business, although

¹ Act of N. Y. of 1882, Ch. 409, sec. The law creating a corporation may 187; Sess. L. of 1882, pp. 655, 656. impose upon parties dealing with the

made by an insolvent corporation, is not prohibited. The act to be void must have been done because of existing or anticipated insolvency.¹ The National Banking Law enacts that "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing, for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."² It was the plain intention of the banking law that all creditors should share equally, and that no preferences should be allowed in favor of one creditor as against others; that the United

corporate body such restrictions as the enacting power deems proper in preserving, applying, or subjecting its assets to the discharge of its obligations, and may, among other things, provide that any one or more of the usual remedies of creditors against a debtor shall, in certain cases, be withheld. *Nat. Shoe and Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; *Kingsley v. First Nat. Bank*, 31 Hun, 329. An insolvent corporation, unless prohibited by charter or statute, may make a general assignment for the benefit of its creditors. *Covert v. Rogers*, 38 Mich. 363; *Ardesco Oil Co. v. North America Oil, etc., Co.*, 66 Pa. St. 375; *Union*

Bank of Tenn. v. Ellicott, 6 Gill & Johns. 363; *Shockley v. Fisher*, 75 Mo. 498; *Alexander v. Commercial, etc., Bank*, 9 Smed. & Marsh, 394; *Hopkins v. Gallatin Turnp. Co.*, 4 Humph. 403. On a general assignment in behalf of creditors, a bill in equity may be maintained by the assignee, in behalf of all of the creditors, to recover unpaid subscriptions. *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499.

¹ *Dutcher v. Importers'*, etc., *Nat. Bank*, 59 N. Y. 5; *Paulding v. Chrome Steel Co.*, 94 Id. 334. See *Brouwer v. Harbeck*, 5 Selden, 589.

² U. S. Rev. Sts., sec. 5242.

States government, as the guarantor of the circulating notes of the banks, is the only party that is entitled to any preference whatever; that all other creditors are to share alike. And therefore it would seem to follow that if a bank is not in a condition to pay all its creditors, it can only pay them *pro rata*.¹

While in equity the capital stock of a corporation is a fund for the payment of debts, and upon the dissolution of such corporation stockholders may be compelled to pay the amount unpaid on the stock owned by them, for the benefit of creditors, such stockholders can only be made liable where it is shown that the stock is actually taken by them, or fraudulently received, and not where it has been delivered by the corporation in good faith and for an adequate consideration to a contractor in payment for work.²

Shares of stock issued by the board of directors as fully paid, not questioned at the time by the corporation, by its stockholders, nor by creditors, and sold by the holder as fully paid shares to purchasers for value, without notice of

¹ Irons v. Mansf. Nat. Bank, 6 Biss. 301, per Blodgett, J. See Nat. Bank v. Colby, 21 Wall. 609; Venango Nat. Bank v. Taylor, 56 Pa. St. 14; Wheelock v. Kost, 77 Ill. 296; Bodley v. Goodrich, 7 How. 276. The words of prohibition in sec. 5242 of U. S. Rev. Sts. apply only to insolvent corporations, or one about to become so, the object of the section being to prevent one creditor of a corporation, whose assets are insufficient to meet its liability, from obtaining a preference, whether it is sought through a voluntary assignment, or transfer, or payment, or the form of a legal proceeding. Robinson v. Nat. Bank of Newberne, 81 N. Y. 385. The transfer must have been made after the commission of an act of insolvency, or in contemplation of insolvency, and with

a view to give a preference to one creditor over another, or with a view to prevent the application of the assets of the bank in the manner prescribed by the currency act. Case v. Citizens' Bank, 2 Woods, 23. The preference of one creditor to another mentioned in the statute is a preference given to an existing creditor for a pre-existing debt. If a friend of a bank, knowing it to be embarrassed and in need of assistance, proffers it a loan in cash on receiving security for the amount, that is not giving him a preference over other creditors. Other creditors are not injured by such a transaction, as, in place of the security such a creditor receives, he leaves an equivalent. Casey v. La Société, etc., 2 Woods, 77.

² Van Cott v. Van Brunt, 82 N. Y. 535, overruling S. C. 2 Abb. N. C. 283.

the equities between him and the corporation, cannot be held subject to such equities and to a liability to have shares thus issued and purchased treated as unpaid stock.¹ When shares are issued by a corporation to a subscriber as fully paid shares and are sold by him as such, there is no ground on which a promise can be implied on the part of a purchaser, without notice to be answerable either to the corporation or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, he having agreed to purchase fully paid shares, nor on the ground of fraud, which he was not bound to suspect, and was not therefore in any sense a party to it.² In Sawyer v. Upton,³ the court, in speaking of the capital stock of a corporation as a fund set apart for the payment of its debts, say: "If diverted, the creditors may follow it so far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice." In Nichols' Case⁴ Lord CAIRNS said: "Before the passing of the act, it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares.' But the abuse of such contracts led to a statutory provision making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defense; but we have now to consider the case of a *bona fide* transfer for value, and I want to know how the section can affect such a transaction. It leaves untouched the question of payment, and

¹ Steacy v. Little Rock, etc., R.R. Co., 5 Dillon, 348.

² Brant v. Ehlen, 59 Md. 1.

³ 91 U. S. 60.

⁴ L. R. 7, Ch. 533.

says nothing as to evidence of payment; but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute. He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much has been said as to the burden of proof, and as to the necessity for showing an absence of notice. If the shares come in the regular course of business into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact."¹

Where the corporation has the abstract power to increase its capital stock, but the attempted increase is illegal in consequence of failure to comply with the requirements of the charter, nevertheless, as against the creditors of the corporation, the stockholders, by voting for the increase of the stock, by accepting their proportions of it, by taking a dividend upon it, and by holding it out to those dealing with the corporation as a component of its capital, will be estopped from denying the legal validity of the increase and be held responsible the same as if it was valid.²

¹ See *Phelan v. Hazard*, 5 Dillon, 45. Where a railroad company executed a deed of trust on its franchise and road, but the deed did not mention unpaid subscriptions to its capital stock, it was held that the purchasers under such a deed acquired no claim to such unpaid subscriptions, and that a subscriber had no power to deliver any portion of such

unpaid subscriptions to such purchasers as against the rights of the creditors of the company. *Morgan County v. Thomas*, 76 Ill. 120.

² *Veeder v. Midgett*, 95 N. Y. 295, disting. *Scovill v. Thayer*, 105 U. S. 143. Where third parties have dealt with the corporation, relying upon the existence of corporate authority to do

If stock is pledged, a delivery is essential to the validity of the pledge, at least as against creditors, and to constitute such a delivery, the pledge should be clothed with the usual *indicia* of ownership. Until a transfer is recorded or is entered of record, there has been no such change of possession as will prevail against an attaching creditor, unless in cases where due diligence has been used to make the record, and the attachment has intervened.¹

an act, it is not necessary that there be an express assent thereto on the part of the stockholders to work an equitable estoppel. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and, where harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. Acquiescence or tacit assent has been defined to mean "the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss." Kent v. Quicksilver Mining Co., 78 N. Y. 159, per FOLGER, J. See Hazlehurst v. Savannah, etc., R.R. Co., 43 Ga. 13; Sheldon H. B. Co. v. Eicke-meyer, 90 N. Y. 613.

If a corporation has been regularly organized and contracted debts as such, creditors can enforce payment of subscriptions, although there may have been a formal defect in the certificate or otherwise. Gaff v. Flesher, 33 Ohio St. 107. The stockholders of an insolvent corporation will be assessed for their unpaid shares, although in their subscriptions no time was specified for the payment of the same. *In re* Glen Iron Works, 13 Phila. 479. Where a corporation conveys unconditionally to one of its creditors an order for part

of an unpaid subscription, the subscriber cannot set up in defense that such creditor has not fulfilled his contract with the corporation. Morgan County v. Thomas, *supra*. In 1837 B. being indebted to the defendants, transferred to them on the books of a corporation certain shares of stock owned by him, and delivered to the defendants the usual certificate. The debt was paid in 1838, whereupon the defendants returned the certificate to B., with a written indorsement authorizing a re-transfer of the shares, which, however, was not done until March, 1840. By the charter the stockholders were made personally liable for the debts of the corporation. It was held that the defendants were stockholders until the time of the re-transfer, and were therefore liable for debts contracted by the corporation in January, 1840. If the defendants had assigned the stock to B. upon receiving payment of his debt, it is possible that an action could not have been maintained. The assignment as between the parties to it would have passed the legal interest in the stock, although no transfer had been made on the books of the corporation. Adderly v. Storm, 6 Hill, 624. See Bank of Utica v. Smalley, 2 Cowen, 770.

¹ Pinkerton v. Manchester, etc., R.R. Co., 42 N. H. 424. Where an act incorporating a company prescribes the mode of attaching the stock for the sat-

§ 209. Meaning and nature of dividend.—By the term dividend is understood, in this connection, the apportionment or division by a corporation of its net earnings among its stockholders.¹ Net earnings are properly the gross receipts less the expense of conducting the business of the corporation to earn such receipts. When all liabilities are paid, the remainder is the profit of the shareholders to go toward ,

isfaction of the debts of the holder, the provisions of the act must be strictly complied with, to make an attachment valid as against subsequent purchasers. Titcomb v. Union M. & F. Ins. Co., 8 Mass. 326. See Denny v. Hamilton, 16 Id. 402 ; Howe v. Starkweather, 17 Id. 240. Under the act of Pennsylvania of 1814 banks had a lien upon stock, though levied on by a judgment creditor, for notes drawn before but falling due after the levy, and in a sale on execution it was the right of the stockholder alone that was sold, and the creditor or purchaser had no greater right than the debtor had. The bank was not bound to appropriate a part of the stock to pay its debt, and transfer the balance, even if the stock was sufficient to pay it and leave a balance. Morgan v. Bank of N. A., 8 Serg. & Rawle, 73 ; Rogers v. Huntingdon Bank, 12 Id. 77 ; Sewall v. Lancaster Bank, 17 Id. 285. The general railroad act of New York of 1850 does not create a lien upon the stockholder's property, or an absolute debt against him individually. Should the company forfeit the stock before an action for the non-payment of the subscription is commenced, he ceases to be a stockholder and is not liable. The act creates no new liability of the stockholder in favor of a creditor. Mills v. Stewart, 41 N. Y. 384. The general law of Louisiana declared that no stockholder should ever be held responsible for the contracts of a corpo-

ration in any further sum than the unpaid balance due on the shares owned by him. The charter of a corporation provided that forty per cent. of the par value of the shares should be paid in, and that the balance on each share, or any portion of such balance, should not be called for, unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation. It was held that the charter gave notice to the public that the stockholders were under no obligation to pay more than forty per cent. except under the circumstances named, and that there was otherwise no liability of a subscriber beyond the amount specified for the debts of the corporation. Louisiana Paper Co. v. Waples, 3 Woods, 34. See Stark v. Burke, 9 La. An. 341 ; Penobscot, etc., R.R. Co. v. Dunn, 39 Me. 587. Where a recovery is had against a stockholder on an indebtedness of the corporation, he is liable for interest from the commencement of the action. Burr v. Wilcox, 22 N. Y. 551. A subscriber is not liable for debts contracted by the corporation before he became a stockholder. Tracy v. Yates, 18 Barb. 152.

¹ Lockhart v. Van Alstyne, 31 Mich. 76 ; Curry v. Woodward, 44 Ala. 305 ; Chaffee v. Rutland R.R. Co., 55 Vt. 110 ; Gordon v. Richmond, etc., R.R. Co., 78 Va. 501 ; Brundage v. Brundage, 60 N. Y. 544. See Goldsmith v. Swift, 25 Hun, 201 ; Granger v. Bassett, 98 Mass. 462.

dividends, which are thus paid out of the net earnings.¹ "The capital stock of a corporation is, like that of a copartnership, or joint stock company, the amount which the partners or associates put in as their stake in the concern. To this they add, upon the credit of the company, from the means and resources of others to such extent as their own prudence or the confidence of such other persons will permit. Such additions create a debt; they do not form

¹ St. John v. Erie R.R. Co., 22 Wall. 136; S.C. 10 Blatchf. 271. Where the preferred stock of a railroad company is entitled to preferred dividends out of the net earnings of the road if earned during the current year, after payment of mortgage interest and delayed coupons, the dividends are not payable until payment by the company of interest on old debts, rent for roads leased by the company, and interest on additionally borrowed money. Ibid. "Profits and income are sometimes used as synonymous terms; but strictly speaking, income means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while profits generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account." People v. Supervisors, 4 Hill, 20, per BRONSON, J. The stockholders of a railroad company voted to pay interest on money paid in, until the road was completed. The road being finished, the stockholders by vote authorized the directors to declare and adjust "interest dividends," with the understanding that if there were not sufficient money in the treasury to meet the full amount of the dividends, they should be paid *pro rata* so far as the treasurer was able to pay. It was held that the fact that there was money in the treasury was a condition precedent to the pay-

ment of the dividends. Cunningham v. Vermont, etc., R.R. Co., 12 Gray, 411. Where a railroad corporation stipulated that each shareholder should be entitled to interest on sums paid on stock subscriptions while the road was in process of construction until it was completed and went into operation, payable whenever the surplus earnings should enable it to do so, it was held that the ability of the corporation must consist of a fund not only adequate for the payment of interest to stockholders, but there must be a surplus fund over and above what was requisite for the payment of the current expenses of the business and for discharging its duties to creditors, and also over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders. Richardson v. Vt. & Mass. R.R. Co., 44 Vt. 613. See McLaughlin v. Detroit, etc., R.R. Co., 8 Mich. 100. The guaranty of a dividend by a railroad company means nothing more than a pledge of the funds legally applicable to that purpose. Henry v. Gt. Northern R.R. Co., 3 Jur. 1133; Crawford v. North Eastern R.R. Co., 3 Jur. N. S. 1093; Taft v. Hartford, etc., R.R. Co., 8 R. I. 310.

capital. And if successful in their career, the surplus over and above their capital and debts becomes profits, and is either divided among the partners and associates, or used still further to extend their operations."¹ "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is to make expenses appear as small as possible, so as to have a large apparent

¹ *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280, per SANDFORD, Assistant V. C.

surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the despatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed."¹

The capital stock of a corporation may be reduced below the amount limited by the charter by the loss, misfortune, or misconduct of the managing officers. When the corporate property exceeds that limit the excess is surplus. Such surplus belongs to the corporation, and, in a general sense, is a portion of its capital, but in a strictly legal sense it is not a portion of its capital, and is always regarded as surplus profits. The surplus may be in cash, and then it may be divided in cash; it may be in property, and if the property is so situated that a division of it among stockholders is practicable, a dividend in property may be declared, and the property be distributed among the stockholders;² it may

¹ Union Pacific R.R. Co. v. U. S., 99 U. S. 402, per BRADLEY, J. 52 Barb. 45; Williams v. Western Union Tel. Co., 93 N. Y. 162. See Strong

² Scott v. Cent. R.R., etc., Co. of Ga., v. Brooklyn, etc., R.R. Co., Ib. 426.
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be in scrip, certifying that the holder is entitled to a specified amount of money, with interest, payable at a time named, or in the discretion of the corporation, or convertible if desired by the holder into stock, bonds, or land of the corporation;¹ or there may be made a stock dividend by issuing new shares to the extent of the surplus on hand.²

Profits may signify either the net earnings, deducting merely the current working expenses, or the balance, if any, after defraying every expense.³ In *Corry v. Londonderry, etc., R.R. Co.*⁴ the Master of the Rolls said: "All of the

¹ *Bailey v. Railroad Co.*, 22 Wall. 604; *Brundage v. Brundage*, 60 N. Y. 544; *People v. Board of Assessors*, 76 Id. 202; 16 Hun, 196; *Brown v. Lehigh Coal Nav. Co.*, 49 Pa. St. 270; *Com. v. Pittsburg, etc., R.R. Co.*, 74 Id. 83; *Bailey v. Citizens' Gas Light Co.*, 27 N. J. Eq. 196.

² *Currie v. White*, 45 N. Y. 822; *Williams v. Western Union Tel. Co.*, 93 Id. 162; *Gordon v. Richmond, etc., R.R. Co.*, 78 Va. 501; *Jones v. Morrison*, 31 Minn. 140; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Minot v. Paine*, 99 Mass. 101; *Rand v. Hubbell*, 115 Id. 461; *Lord v. Brooks*, 52 N. H. 72; *Moss' Appeal*, 83 Pa. St. 264; *Biddle's Appeal*, 99 Id. 278.

³ *Mills v. Northern R.R. Co.*, 5 Ch. 621, 631. Terms of subscription were as follows: "We, the undersigned, stockholders in the" (naming the company) "agree to take and pay for the number of shares set to our names, at \$100 a share, by paying the money therefor, or giving our notes payable in four, eight, and ten months, on the following conditions, viz.: So much of the net earnings of the road as may be necessary, after paying interest to the bondholders, shall be applied to the payment of twelve per cent. semi-an-

nual dividends of six per cent. each, to the holders of stock hereby created, until the net earnings of the road shall be sufficient to pay an interest of six per cent. on the stock and all the bonds of the first and second loans." This proposition was ratified by the company at a meeting of the stockholders. The form of the certificates was as follows: "Preferred stock. This certificate is for preferred stock, and entitles the holder, from the net earnings of the road, to the payment of six dollars per share semi-annually, until the net earnings of the road shall be sufficient to pay an interest of six per cent. per annum on all the stock issued, and all the bonds issued for the first and second loans."

It was held that the words "in semi-annual dividends" were not used in a technical sense, but meant semi-annual payments depending upon no contingency except that the net earnings of the road, after paying interest to bondholders, should be sufficient to meet the obligation, and that the contract in relation to the earnings had reference to the annual operations of the road. *Bates v. Androscoggin, etc., R.R. Co.*, 49 Me. 491.

⁴ 29 Beav. 263. An agreement by a corporation to pay annual dividends,

debts of the company are first payable, other than those which for want of a better expression may be called funded debts. For instance, if the defendants have raised money by mortgage under the powers contained in their act for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits, before the profits are divided. But, on the other hand, any debts which have been incurred and which are due from the directors of the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time had the defendants possessed the necessary funds for that purpose, are so many deductions from the profits, which in my opinion are not ascertained till the whole of them are paid." If the corporation is insolvent, the surplus funds as well as the capital stock, must, if required, be applied in satisfaction of its debts.¹

A company was formed in England under the companies act of 1862 for running the blockade during the American rebellion. The articles provided that dividends should not be paid except out of profits, and that the directors should declare a dividend as often as the profits in hand were sufficient to pay five pounds per cent. on the capital, subject to the resolutions of a general meeting. In 1864 a dividend was declared and sanctioned at a general meeting, and subsequently paid upon a balance-sheet in which a debt due from the Confederate government, cotton in the Confederate States, and also ships engaged in running the blockade, were estimated at the full nominal value. All of these assets were lost, and the company was wound up. It was held that as the estimate was made *bona fide*, and the facts appeared truly in the balance-sheet, the balance-sheet was

without reference to its power to pay them from its earnings, would be void. ¹ Scott v. Eagle Ins. Co., 7 Paige Ch. Lockhart v. Van Alstyne, *supra*.

not delusive, and the dividend must be considered to have been made out of profits, although the company had to borrow the money to pay it.¹

Where dividends have been improperly paid, there having been in fact no profits, a judgment creditor of the corporation, upon a return of *nulla bona* on his execution, may subject the fund so improperly paid out to the satisfaction of his judgment.² If the corporation has paid out of the revenue what was properly chargeable to the capital, it may, at a subsequent time, recoup the revenue account out of the capital. "The whole of the averment, as I read it here," said Lord HATHERLY, L. C.,³ "is really this, that the directors have said in their report that they are going to carry back to revenue what they have borrowed from it for the purpose of capital; and when they have carried that back to revenue, then they are going to make a dividend. I do not see anything *ultra vires* in what is either there alleged or suggested."

§ 210. Right and power of corporation in relation to dividends.—A declaration of profits is unknown in the law or in the practice of corporations as in itself, and without further action by the directors, entitling shareholders to dividends. Dividends are declared by some formal act of the corporation, the question whether there are or are not profits being settled by the accounts of the company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books.⁴

The managers of a corporation are clothed with a large discretion with reference to the declaration of dividends.

¹ Stringer's Case, L. R. 4, Ch. 475. See Bloxam v. Metrop. R.R. Co., 3 Id. 337.

² Gratz v. Redd, 4 B. Mon. 178; Bartlett v. Drew, 57 N. Y. 587; Hastings v. Drew, 76 Id. 9; Osgood v. Laytin, 3 Keyes, 521. See Lexington Ins.

Co. v. Page, 17 B. Mon. 412; Evans v. Coventry, 8 De G. M. & G. 835; Rance's Case, L. R. 6, Ch. 104; Turquand v. Marshall, L. R. 4, Ch. 376.

³ Mills v. Northern R.R. Co., *supra*.
⁴ N. Y., etc., R.R. Co. v. Nickals, 119 U. S. 296.

They may be compelled to exercise their discretion if they improperly fail or refuse to do so. But when they have exercised it without any violation of the charter, their action cannot be disregarded or controlled by a court at the instance of a stockholder, unless it is shown to have been an abuse of their discretion, or the result of bad faith, or of a wilful neglect or breach of duty.¹ In a suit by a stockholder against the corporation to compel it to declare and pay a dividend, the court said : "The funds on hand which the plaintiff asks to have divided and distributed among the several stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is of no sort of consequence, in a legal point of view, that the debt is not yet due and has a number of years to run before it matures. The creditors still have the better right to the funds which the defendant holds for them in trust. The court cannot undertake to say judicially that the future business of the corporation will be prosperous ; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain that they would accrue. The board of directors, in their discretion, and in view of all the facts within their knowledge, might do this ; but no court, I apprehend, would even undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed."²

But although, as a general rule, the officers of a corporation

¹ Smith v. Prattville Manf.Co., 29 Ala. 503; Luling v. Atlantic Mu. Ins. Co., 45 Barb. 510; Howell v. Chicago, etc., R.R. Co., 51 Id. 378; Ely v. Sprague Clarke, N.Y.Ch. 351; Utica v. Churchill, 33 N. Y. 238; People v. Commissioners, 35 Id. 430; Williams v. Western Union Tel. Co., 93 Id. 162; Pratt v. Pratt, 33 Conn. 446; Jackson v. Newark Plank R. Co., 31 N. J. 277; Park v.

Grant Locomotive Works, 40 N. J. Eq. 114; Coyte v. Gold, etc., Mining Co. v. Ruble, 8 Oregon, 284; Wiltbank's Appeal, 64 Pa. St. 256; Coleman v. Columbia Oil Co., 51 Id. 74; Richardson v. Vermont, etc., R.R. Co., 44 Vt. 613; Chaffee v. Rutland R.R. Co., 55 Id. 110.

² Karnes v. Rochester, etc., R.R. Co., 4 Abb. Pr. N. S. 107.

are sole judges as to the propriety of declaring dividends, and the court will not interfere with the proper exercise of their discretion, yet where the right to a dividend is clear and requires the directors to take action before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, a court of equity will interpose its authority.¹ As the directors of an insurance company are bound to exercise a proper discretion in making dividends of surplus profits, if they abuse the power by dividing the unearned premiums without leaving sufficient to satisfy the probable losses, they may, in case of an extraordinary loss which is enough to exhaust the whole capital and more, make themselves personally liable to the company. On the other hand, should they, without reasonable cause, refuse to divide what is actually surplus profits, the stockholders are not without remedy.² A person

¹ Boardman v. Lake Shore & Mich. Southern R.R. Co., 84 N. Y. 157; Brown v. Buffalo, etc., R.R. Co., 27 Hun, 342; Beers v. Bridgeport Spring Co., 42 Conn. 17; Park v. Grant Locomotive Works, 40 N. J. Eq. 114.

² Scott v. Eagle Fire Ins. Co., 7 Paige Ch. 198; De Peyster v. Am. Fire Ins. Co., 6 Id. 486; Carpenter v. N. Y. & New Haven R.R. Co., 5 Abb. Pr. 277. See March v. Eastern R.R. Co., 43 N. H. 515. Where a suit was brought by a stockholder of a railroad company to restrain the company from paying a dividend declared by the directors, on the ground that among the persons who were designated as stockholders in the company there were several who held stock fraudulently issued, it was held that as to those who had been ascertained to hold genuine stock there was no reason for prohibiting the payment to them of a dividend; but as to all other stockholders, the directors were restrained from making any dividend on the stock of the company un-

til, by the decision of some court of competent jurisdiction, it should be established who were the genuine stockholders in the company, or until the further order of the court. Underwood agst. N. Y. & New Haven R.R. Co., 17 How. Pr. 537.

An act of New York, Laws of 1825, ch. 325; Rev. Sts. ch. 18, part 1, tit. 4, sec. 2, provides that it shall not be lawful for the directors or managers of any incorporated company in the State to make dividends except from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the said capital stock without the consent of the legislature; and it shall not be lawful for the directors of such company to discount or receive any note or other evidence of debt in payment of any instalment actually called in and required

holding as owner the stock of a corporation, becomes thereby entitled to a proportionate share of the profits. Consequently a duty is imposed by law on the body corporate

to be paid, or any part thereof, due or to become due on any stock in the said company; nor shall it be lawful for such directors to receive or discount any note or other evidence of debt with the intent of enabling any stockholder in such company to withdraw any part of the money paid in by him on his stock; and in case of any violation of the provisions of this section, the directors under whose administration the same may happen, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall, in their individual and private capacities, jointly and severally, be liable to the said corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock of the said company so divided, withdrawn, paid out, or reduced, and to the full amount of the notes or other evidences of debt so taken or discounted in payment of any stock, and to the full amount of any notes or evidences of debt so discounted with the intent aforesaid, with legal interest on the said respective sums from the time such liability accrued; and no statute of limitation shall be a bar to any suit at law or in equity against such directors for any sums for which they are made liable by this section; provided this section shall not be construed to prevent a division and distribution of the capital stock of such company which shall remain after the payment of all its debts upon the dissolution of such company, or the expiration of its charter. The foregoing provisions were intended to prevent the di-

vision, distribution, withdrawal, and reduction of the property of a corporation below the sum limited in its charter or articles of association for its capital, but not to prevent its increase above that sum. *Williams v. Western Union Tel. Co.*, 93 N. Y. 162.

The New York Penal Code, sec. 594, enacts that a director of a stock corporation who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended to make a dividend except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law, or to divide, withdraw, or in any manner pay to the stockholders or any of them any part of the capital stock of the corporation, or to reduce such capital stock without the consent of the legislature; or to discount or receive any note or other evidence of debt in payment of an instalment of capital stock actually called in and required to be paid, or with intent to provide the means of making such payment; or to receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock, or to apply any portion of the funds of such corporation, except surplus profits, directly or indirectly to the purchase of shares of its own stock; or to receive any such shares in payment or satisfaction of a debt due to such corporation; or to receive in exchange for the shares, notes, bonds, or other evidences of debt of such corporation, shares of the capital stock or notes, bonds, or other evidences of debt issued by any other stock corpo-

to distribute all dividends which from time to time may be declared ratably on its stock. From this duty springs an implied promise, for the breach of which an action of assumpsit will lie.¹ The duty to declare a dividend when profits are in hand is not due to any particular member, but to the community of members, and hence there is no promise in favor of a separate shareholder. After, however, a dividend has been declared, the right to the profits becomes individualized, and the duty to distribute becomes attached as a right to each member.² When a dividend has been once declared, the directors cannot afterward refuse to pay it because they have determined to establish a surplus fund with a view to benefit the corporation and its stockholders. The dividend when declared becomes a debt, and cannot thenceforth be disposed of without the consent of him who is entitled to it.³

ration, shall be deemed guilty of a misdemeanor.

Chapter 409 of the act of New York of 1882 to revise the statutes of the State relating to banks, banking and trust companies, section 40, provides that "if any portion of the original capital of any such association shall be withdrawn for any purpose whatever while any debts of the association remain unsatisfied, no dividends or profits on the shares of the capital stock of the corporation shall thereafter be made until the deficit of capital shall have been made good, either by subscription of the shareholders, or out of the subsequently accruing profits of the association; and if it shall appear that any such dividends have been made, it shall be the duty of the supreme court to make the necessary orders and decrees for closing the affairs of the association, and distributing its property and effects among its creditors and shareholders." Sess. Laws of N. Y. of 1882, vol. 1, p. 599.

¹ King v. Paterson, etc., R.R. Co., 29 N. J. (5 Dutcher) 82.

² Jackson v. Newark Plank R. Co., 31 N. J. 277; Carpenter v. N. Y. & New Haven R.R. Co., 5 Abb. Pr. 277. On the tenth of November an insurance company declared a dividend payable on the first of December following, deposited the money in a bank, and drew checks against it in favor of stockholders. On the thirtieth of November of the same year the company failed and passed into the hands of a receiver. It was held that the dividend was a trust fund belonging to the several stockholders, and did not go to the receiver with the other assets for the benefit of the general creditors of the company. Le Roy v. Globe Ins. Co., 2 Edw. Ch. 656.

³ Seeley v. N. Y. Nat. Exch. Bank, 8 Daly, 400, aff'd 78 N. Y. 608; Beers v. Bridgeport Spring Co., 2 Weekly Dig. 8; 42 Conn. 17. A national bank cannot, after reducing the amount of its capital stock, retain as a surplus for

There is a difference where a bank or moneyed institution merely reserves a portion of its earnings as a surplus fund to guard against contingencies, to protect the principal, to fortify its credit, and facilitate its operations, doing no other act than to blend the income thus retained with and make it a part of the capital stock, and where the earnings are legally and in good faith appropriated and applied

other purposes any portion of the money which it received for the stock that is retired, but must return it to the stockholders. Seeley v. N. Y. Nat. Exch. Bank, *supra*. VAN HOESEN, J.: "If the defendant had determined to discontinue business and wind up its affairs, there is no doubt that the shareholders would be entitled to a distribution of whatever assets of the corporation might remain after its debts had been paid. If, instead of surrendering all its corporate powers, a corporation by reducing its capital stock relinquishes a portion of them, it seems to me that the shareholders may properly claim a distribution of the money which the corporate body has no longer the right to use as capital. The abandonment by a corporation of all its corporate rights gives the stockholders a right to the distribution of all the net assets. Why should not an abandonment of a portion of those rights give the stockholders a right of distribution *pro tanto*? Of course, if the capital stock has been impaired, the amount to be returned to the stockholders must be diminished. It is said that the capital of the defendant has not been impaired, but that the directors deem it advantageous to retain as a surplus one-half of the amount which was subscribed and paid for the stock which has been called in. The reason assigned is not, in my opinion, any justification for withholding from the plaintiff his share of the money that was paid in exchange for the stock that is

retired. That money was paid as capital, and if it be no longer needed for that purpose, and if it be not required for the payment of debts, it has accomplished the end for which it was subscribed, and ought to be returned to the shareholders. The bank has gone out of existence as a corporation with a capital of \$500,000. Under a modified charter it commences a new life with a capital of \$300,000. So far as the \$200,000 of reduced stock is concerned, the corporation must be considered as having surrendered its charter and wound up its business. This being so, there is no doubt as to the duty it owes to the stockholders who own the retired stock. The able counsel for the defendant insists that it is discretionary with the directors either to return the money to the shareholders or to retain it as a surplus, and that by retaining it the bank does the plaintiff no injury, inasmuch as his shares will increase in market value as they diminish in number, and he will own one two-hundredth part of the new capital stock, just as he owned one two-hundredth part of the old capital stock. It is true that his proportion of the capital stock will relatively be as great as before the reduction, but it is altogether matter of conjecture as to the future market value of a share of the reduced stock. The return of the reduced capital to the shareholders is not, however, a subject for the exercise of a director's discretion."

by the corporation to enlarge or improve its property, and are thus as it were fused into the capital stock. An example of the latter would be afforded if a railroad corporation should devote its earnings to the erection of buildings or the purchase of wharves, grain elevators, and the like, necessary or convenient for the prosecution of its business, thus enlarging and improving its property, and issuing new certificates of stock, or in any other form placing in the hands of its stockholders evidence of their interest in the addition thus made.¹ The doctrine that where a corporation is about to exceed its powers by applying its property to objects beyond the authority of its charter, a court of equity will grant relief to a minority of its stockholders who dissent from such use of its funds, necessarily results from the principle that the corporation and its directors are trustees, and as such may be called into a court of equity, either for an account or to restrain them from mismanagement of the corporate property, especially for a fraudulent mismanagement of it, or for the purpose of compelling the corporation to declare dividends from its surplus earnings, when such dividends are needlessly and improperly withheld.²

§ 211. Profits to be distributed equally among all entitled.—Dividends must be made equally among stockholders belonging to the same class without unjust discrimination.³ Any action of a corporation which divides the

¹ Lord v. Brooks, 52 N. H. 72; Leland v. Hayden, 102 Mass. 550; *In re Barton's Trust*, L. R. 5, Eq. 238; *Perry on Trusts*, 488 note. See *State v. Balt. & Ohio R.R. Co.*, 6 Gill, 363.

² *Pratt v. Pratt*, 33 Conn. 446. Where at the time dividends were made the corporation was in a prosperous condition, and they were received by a stockholder in good faith as legitimate income, he cannot be compelled to repay them with interest for the benefit of

creditors after he has sold his stock and no longer has any interest in the company. *Reid v. Eatonton Mant. Co.*, 40 Ga. 98.

³ *Harrison v. Mexican R.R. Co.*, L. R. 19, Eq. 358. As, *prima facie*, all stockholders at any particular period are equally interested in the property and business of the corporation, a board of directors in making a dividend afterward declared cannot discriminate between them unless the charter of the

shares of its capital stock already sold and in the hands of lawful owners into two distinct classes, one of which is thereby given prior right to receive a fixed sum from the earnings before the other can have any receipt therefrom, and if given an equal share afterward with the other in what earnings may remain, destroys the equality of the shares, materially varies the effect of the certificate of stock, and takes away a right.¹ The power to issue preferred stock of such a description cannot be maintained without actual authority of law or the consent of the holders of the common shares. As shares are issued in a form "importing a right in the holder to demand and receive a corresponding portion of the net earnings of the company, it cannot consistently be held that he can be deprived without his own consent of that right by the combined act of the directors and other shareholders in the corporation. If that could be done, corporations would be enabled under the sanction of the law to perpetrate the most gross frauds; for they could receive the subscriber's money ostensibly and expressly for one thing and afterward deprive him of its substantial benefit by converting it into

company gives them that power. Jones v. Terre Haute, etc., R.R. Co., 57 N. Y. 196; 29 Barb. 353; 17 How. Pr. 529; Luling v. Atlantic Mu. Ins. Co., 45 Barb. 510; Howell v. Chicago, etc., R.R. Co., 51 Barb. 378; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Atlantic & Ohio Tel. Co. v. Com., 3 Brewst. 366; Ryader v. Alton, etc., R.R. Co., 13 Ill. 516; Stoddard v. Shetucket Foundry Co., 34 Conn. 542. The purchaser of shares of stock in a corporation becomes at once entitled to all the profits not then divided, provided he remains a member until a dividend is made, and it is immaterial at what time and from what sources profits have been earned. March v. Eastern R.R. Co., 43 N. H. 515; Goodwin v. Hardy, 57 Me. 143.

The party with whom the funds are deposited is the agent of the corporation, not of the stockholders, and if the fund is lost in the agent's hands, the loss must fall on the corporation. King v. Paterson, etc., R.R. Co., 5 Dutcher N. J. 504.

¹ Reese v. Bank of Montgomery County, 31 Pa. St. 78; Jackson v. Newark P. R. Co., 31 N. J. 277; Beers v. Bridgeport Spring Co., 42 Conn. 17; Hale v. Republican River Bridge Co., 8 Kansas, 466; Howell v. Chicago, etc., R.R. Co., 51 Barb. 378; Chase v. Vanderbilt, 62 N. Y. 307; Kent v. Quicksilver Mining Co., 78 Id. 159. But stockholders may, by acquiescence in such action of the corporation, be bound thereby. Ibid.

another entirely different and of inconsiderable value."¹ The articles of association of a railroad company provided that the directors might, when authorized by a resolution of the company, previously adopted at a general meeting, increase the capital by issuing new shares, such increase of capital to be made in the manner, to the amount, and subject to such rules and regulations, privileges, and conditions as the company in general meeting should think fit. It was held that the company was authorized to issue shares having attached to them a preferential dividend.²

Preferred stock usually gives the holders merely priority of dividends, and not of assets or capital. When, however, a clear power to issue preference capital is given, the holders of the latter may rank before, and even to the exclusion of the ordinary members.³ An act provided that manufacturing corporations might issue preferred stock, the proceeds to be exclusively employed in paying the debts of the corporation and supplying a working capital, and that the directors might guarantee the holders semi-annual dividends

¹ *Kent v. Quicksilver Mining Co.*, 12 Hun, 53, per DANIELS, J. FOLGER, J., in delivering the opinion of the New York Court of Appeals in the same case, said: "We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for about what class of stock he put down his name, and what right he got when he thus became a stockholder. . . . This corporation did otherwise: —a by-law was duly made which declared the whole value of its property, and the whole amount of its capital stock, and divided the whole of it into

shares equal in amount, and directed the issuing of certificates of stock therefor. . . . When that by-law was adopted, it was as much the law of the corporation as if its provisions had been a part of the charter."

² *Harrison v. Mexican R.R. Co.*, L. R. 19, Eq. 358. In *Covington v. Covington, etc., Bridge Co.*, 10 Bush. Ky. 69, it was held that the legislature might constitutionally authorize a corporation, previously created by it, to borrow money by issuing preferred stock, and pledging its revenues for the payment of the dividends thereon, where such a course was necessary to carry into effect the object for which the corporation was created.

³ Green's Brice's Ultra Vires, 2d Am. Ed. 172; *In re Bangor, etc., Slab Co.*, L. R. 20, Eq. 59; *In re London India Rubber Co.*, 5 Id. 519.

not exceeding the rate of interest allowed by law ; and a time of final payment of such preferred stock was to be named in the certificates, with the right of the holder to convert the preferred stock into common stock. The preferred stock-holders were not entitled to vote, and were not liable for the debts of the corporation. A manufacturing corporation having issued preferred stock, and executed and delivered to a trustee its bond and mortgage to secure the payment of the same, it was held that the transaction was in fact and in law a loaning of money on mortgage security, and not the creation of additional members of the corporation ; that the act was to be construed as merely authorizing the corporations named to borrow money, to guarantee its repayment by mortgage or otherwise, and to give the lenders the option to convert the loan into stock. "But for the words 'stock' and 'dividends' occurring in the act," said the court, "no other interpretation would be possible. If we can understand the word 'dividend' in the sense of interest, and the word 'stock' in the sense of debt, so that 'certificates of stock' will mean certificates of indebtedness, and 'preferred stockholders' mean preferred creditors or preferred certificate-holders, there is no trouble in so interpreting the act, and making all its provisions harmonious and constitutional."¹ Where a railroad corporation pursuant to an act "regulating railroad companies," adopts a resolution that the treasurer of the company is directed to allow interest on instalments as paid, payable in stock, and to carry to the account of each stockholder the interest annually, and when the amount is sufficient to issue stock certificates in payment, all the stockholders are entitled to such interest, whether their payments of stock subscriptions were made before or after the passage of the resolution. It is obvious that if those who paid their subscriptions pre-

¹ *Burt v. Rattle*, 31 Ohio St. 116, per WELCH, Ch. J.; *Totten, etc., Co. v. Tison*, 54 Ga. 139.

vious to the passage of the resolution did not participate in the payments of interest or award of stock dividends directed to be made by the resolution, their rights would be injuriously affected by the payment to others; that if the interest were paid in cash, it would be taken in part from funds they had contributed, and for a purpose not contemplated at the time they subscribed; and that if it were paid in stock, the relative value of their stock, which represented a certain share of the entire value of the property and franchises of the corporation, would be *pro tanto* diminished.¹

§ 212. Dividends, in what payable.—In England, a shareholder may refuse to receive a dividend otherwise than in cash.² In the United States, stock or scrip dividends are not uncommon, the prevailing practice being that a corporation which has power to increase its capital stock may retain and use surplus profits for suitable corporate purposes, and issue to the shareholders, in lieu of cash divi-

¹ City of Ohio v. Cleveland & Toledo R.R. Co., 6 Ohio St. 489. In Rutland & Burlington R.R. Co. v. Thrall, 35 Vt. 536, which was an action to recover unpaid assessments upon a subscription for stock, it was claimed by the defendant that the subscription was void on account of a condition in it which provided that interest should be allowed and paid by the company on all sums assessed and paid from the time of payment until the railroad should be put in operation. It was insisted that this condition was in substance an agreement by the company to pay back to the subscribers a part of the capital stock required by the charter, and therefore that the amount required in order to organize the company was not in fact subscribed; that the charter required a million of dollars, and that by this arrangement the amount subscribed was only a million *minus* the interest to be

paid back. It was held by the court that this point was untenable; that as no time was fixed for the payment of the interest, the whole amount subscribed might be expended in constructing the road, and the interest be paid out of the earnings after it went into operation; that upon a capital of a million thus invested the company might borrow money to pay this interest before the road went into operation, charging the future earnings with the payment of the debt; that the condition was just as among the subscribers, those who paid early not losing their interest, and those who paid late not gaining the use of their money by withholding it; and that its practical operation would be beneficial to the company by securing the prompt payment of assessments.

² Hoole v. Gt. Western R.R. Co., L.R. 3, Ch. 262.

dends, new stock to the same amount.¹ When a cash dividend is declared, payment is presumably to be made in lawful money. In a case in New York a bank declared a dividend payable in New York State currency. This currency was offered to the plaintiff, who refused to receive it, as it was then at a discount of one-fourth of one per cent., and he demanded that he be paid in gold or silver, or its equivalent. The Supreme Court held that the plaintiff was bound to receive the dividend in the property in which it was declared. The Court of Appeals, however, in reversing the judgment, decided that a dividend, when declared, became a debt due from the bank to the stockholder, and could be paid only in the legal currency of the country, if insisted upon by him.² Where dividends were declared, during the American rebellion, on the stock of a railroad company of Virginia, and the stock of an owner of shares residing at the North was confiscated, and the dividends thereon paid by order of court to a receiver, without protest on the part of the company, it was held that the company was liable for what the Confederate money, in which the dividends were declared, was worth at the time they were declared, with interest from the filing of the bill, which was the date of demand.³

§ 213. Right to dividends of preference shareholders.—A dividend among preference shareholders exclusively, implies

¹ See *Howell v. Chicago, etc., R.R. Co.*, 51 Barb. 378; *Minot v. Paine*, 99 Mass. 101; *Earp's Appeal*, 28 Pa. St. 368; *Brown v. Lehigh Coal, etc., Co.*, 49 Id. 270; *Wiltbank's Appeal*, 64 Id. 256; *Bailey v. Citizens' Gas Light Co.*, 27 N. J. Eq. 196; *State v. Balt., etc., R.R. Co.*, 6 Gill, 363; *City of Ohio v. Cleveland, etc., R.R. Co.*, *supra*; *Citizens', etc., Ins. Co. v. Lott*, 45 Ala. 185.

² *Ehle v. Chittenango Bank*, 24 N.Y. 548. Followed in *Scott v. Cent. R.R. Co.*, 52 Barb. 45.

³ *Keppel v. Petersburg R.R. Co.*, Chace's Decis. 167. Where a railroad company was authorized to raise additional capital by the issue of new shares, and to allot to them a preferential dividend, and it was enacted that dividends should not be paid from any moneys received for the shares, and that no share should be issued until one-fifth of the amount had been paid, the company was restrained from paying dividends in preference shares. *Hoole v. Gt. Western R.R. Co.*, *supra*.

that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general. Unless there is some agreement to the contrary, preference shareholders are entitled to be paid their dividends to the amount guaranteed before the other shareholders receive anything; so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits, the ordinary shareholders taking nothing until all arrears of guaranteed dividends are paid.¹ In a case in England involving the construction of an act of Parliament, in relation to the preferred stock of a rail-

¹ Lockhart v. Van Alstyne, 31 Mich. 76; Painesville, etc., R.R. Co. v. Leverett, 17 Ohio St. 534; Prouty v. Mich. Southern & Northern Ind. R.R. Co., 4 Thomp. & Cook, N. Y. 230; s. c. 1 Hun, 655; Elkins v. Camden, etc., R.R. Co., 36 N. J. Eq. 233; McGregor v. Home Ins. Co., 33 Id. 181; Union Pacific R.R. Co. v. United States, 99 U. S. 402; Chaffee v. Rutland, etc., R.R. Co., 55 Vt. 110; Totten v. Tison, 54 Ga. 139; Thompson v. Erie R.R. Co., 45 N. Y. 465; Gordon v. Richmond, etc., R.R. Co., 78 Va. 501; Bates v. Androscoggin, etc., R.R. Co., 49 Me. 491; Belfast, etc., R.R. Co. v. Belfast, 77 Id. 445; Cunningham v. Vt., etc., R.R. Co., 12 Gray, 411. See Chase v. Vanderbilt, 62 N. Y. 307; Boardman v. Lake Shore, etc., R.R. Co., 84 Id. 157; Manning v. Quicksilver Mining Co., 24 Hun, 360. "The term *guaranteed* is sometimes employed instead of *preference*, and in one case great stress was laid in the arguments upon the difference, both terms having been used; but PAGE WOOD, V. C., considered that the words had not there received, nor had they by custom acquired, such definite and distinct meanings as would justify him in attributing to them a difference in legal effect."

Green's Brice's Ultra Vires, 2d Am. Ed. 172, referring to Henry v. Gt. Northern R.R. Co., 4 K. & J. 1. "It is perfectly apparent," said the court, in Taft v. Railroad Co., 8 R. I. 335, "that the guarantee of a dividend by a railway company is considered by the courts, and, it seems from the course of argument by the counsel in these causes, who doubtless faithfully expressed the interests and wishes of their clients, by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed; and, as the statement of facts admits that dividends have not been earned in this case, the plaintiff, if there were no other difficulties in his way, could not recover." See Bailey v. Hannibal, etc., R.R. Co., 1 Dillon, 174. Preferred stockholders have not a claim superior to that of creditors under debts contracted by the corporation after the issuance of the preferred stock, they only having priority over the holders of the common stock. Warren v. King, 108 U. S. 389; Burt v. Rattle, 31 Ohio St. 116.

road company, it appeared that there was no obligation to pay the stipulated dividends at any particular time, beyond what might be inferred from the undertaking that they should constitute a specified sum per year. It might reasonably be inferred, from that circumstance, that the obligation at least existed to declare the dividends annually; for that was the apparent purpose of the company according to the form and import of the stock issued. It was held that the stockholder was not deprived of his right to dividends because the earnings out of which they were expected to be made were not realized during the year in which, by the terms of the stock issued, they ought to have been paid; but that the stock was a charge on all accruing profits at the stipulated rates before anything was divided among the shareholders of the common stock.¹ Certificates of stock were issued by a corporation as follows: "Said stock is entitled to dividends at the rate of ten per cent. per annum, payable semi-annually in New York on the first days of June and December in each year, out of the net earnings of the said company; and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent. per annum, and the payment of dividends as aforesaid is hereby guaranteed." At the top of the certificate were the words, "Guaranteed ten per cent. stock." It was held that the dividends were not only to be preferred, but, being guaranteed, were cumulative, and a specific charge upon the accruing profits, to be paid as arrears before any dividends were made upon the common stock; that preference shareholders were entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends or interest, before the other shareholders were entitled to receive anything; and that although they could

¹ *Henry v. Gt. Northern R.R. Co.*, 3 *Jurist N. S.* 1093; *Jurist N. S.* 1133, 1137; *i. De G. & J. Stevens v. South Devon R.R. Co.*, 9 606, 637. See *Crawford v. Northeast-Hare*, 313.

receive no profits where none were earned, yet they were entitled to profits as soon as there were any to divide. The court said : "The stock being both preferred and guaranteed, the inference to be drawn from the nature of the obligation is certainly very strong upon the certificate itself, and we may add conclusive, that a specific sum should be paid as dividends out of the net earnings every year, and if there were none, as soon as received, as was the evident design of the issue of stock. The position of the defendant's counsel that the clauses in the certificate as to the net earnings and the time when the dividends are to be paid limit the contract, and that the holder is only entitled to dividends out of the net earnings if there are any, at the times specified for the payment of the dividends, and if not, he is not entitled to any, therefore would be adverse to the obvious design of the company in the issue of the preferred stock, and cannot, we think, be maintained. The statement of the days when the dividends shall be payable was not the essence of the contract, but merely the designation of times when the owner had the right to receive the dividend. The substance and effect of the language employed is, that these dividends should be paid out of the net earnings at a certain rate per annum, and the times designated for such payment were merely named to carry out the purpose of paying annual dividends. If no times had been designated, the right to the dividends would have been clear and unquestionable out of the net proceeds within the cases relied upon by the respondent's counsel, and it does not affect, impair, or destroy the right, because the days were specially enumerated. The guaranty in the certificate is also entitled to great weight in the interpretation of the contract, and may fairly be construed as an agreement that the dividends shall be paid out of the net earnings which are made chargeable, and the guaranteee is an engagement that they shall be applied for a particular purpose, in prefer-

ence to, or priority over, common and less favored stockholders."¹

§ 214. Stockholders not entitled to share of profits until a dividend has been declared.—A stockholder has no legal title to the property or profits of the corporation until a division is made or dividend declared. Before this is done, what subsequently constitutes the dividend is a part of the assets of the corporation, and an assignment of the stock carries with it a proportionate share of such assets, including, as an incident, all undeclared dividends, which pass with the transfer of the stock as a portion of the capital of the corporation.² The interest which a shareholder has in the

¹ *Boardman v. Lake Shore, etc., R.R. Co.*, 84 N. Y. 157, per MILLER, J. In an action to compel a corporation to pay dividends upon shares of preferred guaranteed stock, resolutions of the board of directors authorizing the issue of the stock, the book of minutes, annual reports, and other proceedings, are admissible to show the real nature of the transaction. The objection to the admissibility of the resolutions and proceedings was mainly based upon the ground that all proceedings prior to the issuing of the certificate became merged in the same, and that such certificate became the contract between the company and the stockholders which could not be varied by the other testimony. The resolution of the directors declared that the dividends at the rate named "shall always be paid upon said guaranteed stock out of any net earnings of the company before any portion of said net earnings shall be applied to the payment of dividends upon the remaining stock of the company"; and the book of minutes containing this and other proceedings relating to the matter, was offered in evidence for the purpose of showing authority for the issue of the stock in

question. Mandamus is not a proper remedy to compel a corporation to pay dividends. *People v. Central Car, etc., Manuf. Co.*, 41 Mich. 166.

² *Boardman v. Lake Shore, etc., R.R. Co.*, 84 N. Y. 157; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Minot v. Payne*, 99 Mass. 101; *Granger v. Bassett*, 98 Id. 462; *Curry v. Woodward*, 44 Ala. 305; *Phelps v. Farmers'*, etc., *Bank*, 26 Conn. 269; *Goodwin v. Hardy*, 57 Me. 143; *Burroughs v. North Carolina R.R. Co.*, 67 N. C. 376; *Brundage v. Brundage*, 65 Barb. 397; S. C. 60 N. Y. 544. "As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit. The wisdom of such distribution must of necessity rest with the corporation itself. From motives of prudence and self-interest, it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion

capital and net earnings of the corporation is of an abstract nature ; that is, he cannot, by any act of his own, nor ordinarily by any act of law, reduce it to possession. The corporation represents the whole body of the shareholders, and to it, before a dividend has been declared, belong all the assets in which the shareholders, as such, are interested. A contract in relation to dividends or profits must be deemed to have reference to dividends or profits to be ascertained and declared by the corporation, and not to growing profits from day to day, or month to month, to be determined upon an investigation by third persons, or courts of justice, of the accounts and transactions of the corporation.¹ Plaintiff transferred a certain number of shares of the stock of a corporation under an agreement that all profits and dividends upon the stock up to January 1, 1872, should be paid to plaintiff. As no dividend was declared until April 9, 1872, it was conceded that the defendant incurred no

for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by an appeal to the ballot at the election for directors." Moss' Appeal, 83 Pa. St. 264, per PAXSON, J.

¹ Clapp v. Astor, 2 Edw. Ch. 379. An agreement to pay interest to the stockholders on the capital stock contributed does not create an absolute liability which the corporation is bound to meet at all events, in preference to, or on an equality with, debts of the corporation due to third persons and founded on a valuable consideration. Barnard v. Vermont, etc., R.R. Co., 7 Allen, 512. Where a certificate for shares of guaranteed stock contained a provision that the stock was entitled to dividends at a certain rate per cent. out of the net earnings of the corporation, and also to share *pro rata* with the other stock in any excess of earnings over such per cent., it was held that the holder of the certificate could not maintain an action

against the corporation for a failure to declare and pay the dividends. Williston v. Mich. Southern, etc., R.R. Co., 13 Allen, 400. A clause in articles of incorporation provided that it should be competent for any extraordinary general meeting, by a majority consisting of two-thirds of the whole number of votes recorded, to bind the corporation to any matter which it by virtue of its corporate capacity or otherwise could lawfully do if the consent of every shareholder were given thereto. It was held that a lease of the corporate property and franchises for a limited period would not be set aside at the instance of a deferred stockholder, provided all had been done *bona fide* with a view of making the most of the assets of the corporation, though during the existence of the lease it would be impossible for the deferred stockholders to receive any dividends. Featherstonhaugh v. Lee Moor, etc., Co., L. R. 1, Eq. 318.

liability in respect thereto. But it was claimed that the increase in the assets of the corporation from the date of the agreement to January 1, 1872, were profits, and that the defendant having, as a stockholder, an interest in them, that interest was a profit on the stock which he had bound himself to pay to the plaintiff. It was held that the words profits and dividends in the contract related to profits or dividends realized by the defendant as a stockholder, or declared by the corporation prior to January 1, 1872, and that as no division of profits or declaration of dividends was made the plaintiff was not entitled to recover.¹

When, however, a corporation by the vote of its directors declares a dividend from profits earned or received, to be paid at such time as may be directed by the board, the amount to be placed *pro rata* to the credit of the stockholders upon its books, the share of each stockholder in the several amounts is thereby severed from the common funds of the corporation, and becomes his individual property. Thenceforth the corporation owes him a debt, payment of which at a proper time he may demand, and, upon refusal, enforce in equity. The legal effect of the vote is that the debt is

¹ Hyatt v. Allen, 56 N. Y. 553. In Manning v. Quicksilver Mining Co., 24 Hun, 361, the owner of certain preferred shares of stock, after having sold the same and delivered certificates to one person, assigned to another all of his right, title, and interest in the assigned shares which he had previously owned. The certificates guaranteed the payment of annual interest out of the net earnings of each year, provided so much in the year preceding had been earned. It did not appear that there had been any separation of this interest from the other assets of the company, or that any of the earnings of the company had been assigned to the payment of the interest; and it was held that the right to recover the

interest was merely an incident to the shares, and depended upon the title thereto, and that the assignee of the interest could not maintain an action to recover the interest, or compel the company to account for it. Dividends declared after a testator's death, or any other contingent event, are not apportionable up to the happening of the event. A statute which provides for the apportionment of the income of property, real or personal, does not change the rule of law with regard to apportioning dividends. Such dividends are not only contingent, but uncertain in amount, until the expiration of the period for which they are declared. Granger v. Bassett, 98 Mass. 462.

to be paid within a reasonable time, and the corporation cannot thereafter nullify its vote or repudiate its obligation, by declining to pay the dividend or to name any time when it will pay it. The majority cannot equitably compel the minority to loan money to the corporation without interest in the form of dividends declared and withheld, beyond the earliest time when they can be paid without serious injury to the interests of the corporation.¹ The investigation of the affairs of the corporation, and ascertainment of a clear surplus, to justify a dividend; declaring the dividend by a resolution of the board of directors; fixing the period for its payment; giving publicity to it; carrying the amount on the books of the corporation to the debit of profit and loss; apportioning the same among the stockholders by filling up and signing checks upon a bank where the funds are deposited for the purpose of being delivered to each stockholder when called for; are acts binding on the corporation, and give to the stockholders individually rights which the directors and officers cannot afterward take from them.²

§ 215. Right of vendee of stock to dividends.—A purchaser of shares in a corporation takes the stock with all its incidents, including the right to receive future dividends, provided he remains a member of the corporation until the dividend is declared, whether the fund appropriated for the

¹ *Jermain v. Lake Shore, etc., R.R. Co.*, 91 N. Y. 483; *Van Dyck v. McQuade*, 86 Id. 38; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *King v. Paterson, etc., R.R. Co.*, 29 N. J. 82; *Hart v. St. Charles St. R.R. Co.*, 30 La. Ann. 758; *City of Ohio v. Cleveland, etc., R.R. Co.*, 6 Ohio St. 489; *People v. Merchants', etc., Bank*, 78 N. Y. 269.

² *Le Roy v. Globe Ins. Co.*, 2 Edw. R.R. Co., 12 CUSH. 68.

Ch. 657. At a meeting of the stockholders of a railroad company it was voted that "all subscribers be allowed interest on all sums paid by them up to the time when the road shall be completed and put in operation." It was held that interest was not payable until the road was completed, notwithstanding a subsequent vote that no interest should accrue or be payable after a certain date. *Wright v. Vermont, etc., R.R. Co.*, 12 CUSH. 68.

purpose was earned either before or after the transfer and delivery of the certificate constituting the evidence of ownership.¹ One who purchases stock is not obliged to look beyond the books of the corporation for the evidence of title, and if he purchases upon that appearance, he is entitled to receive the dividends. The corporation would also be liable to pay the dividends to the true owner if it had suffered the transfer to be entered on the books upon insufficient authority. But when a party has the formal

¹ March v. Eastern R.R. Co., 43 N. H. 515; Harris v. Stevens, 7 Id. 454; Central R.R., etc., Co. v. Papot, 59 Ga. 342; Ryan v. Leavenworth, etc., R.R. Co., 21 Kansas, 365; Union Screw Co. v. Am. Screw Co., 13 R. I. 569; Jones v. Terre Haute, etc., R.R. Co., 57 N. Y. 196; Gifford v. Thompson, 115 Mass. 478; Coleman v. Columbia Oil Co., 51 Pa. St. 74; Goodwin v. Hardy, 57 Me. 143. By the articles of association of a corporation its shares could not be transferred until all instalments were paid. A. having subscribed for stock paid two instalments, and then assigned his shares to B., who paid the other instalments; but before B. notified the corporation that the shares were assigned to him, A. became indebted to the corporation. B. having demanded a transfer of the shares to him, was refused unless he would pay A.'s indebtedness, which he did under protest. In the meantime, and after B. had notified the corporation of the assignment of the shares to him, it had applied on A.'s indebtedness dividends as they were declared on the stock. It was held that the corporation was liable to B. for the amount he had paid on A.'s indebtedness with interest from the date of payment. Bates v. N. Y. Ins. Co., 3 Johns. Cas. 238. A suit was brought by A. against B. on the following agreement: "Earnings from Oct. 1st, 1870, to Oct. 1st, 1871, and all subsequent years on three hundred shares, to be paid to A., and said three hundred shares to be his property, but not to be transferred to him while B. wishes to keep the control of the T. company, said three hundred shares remaining on the books in B.'s name, so as to give him a majority of the stock. If between Jan. 1st, 1864, and Jan. 1st, 1871, A. should die, or leave the T. company, *pro rata* shares for the then expired term shall be considered as earned and due under this agreement subsequent to Jan. 1st, 1871. When B. can control a majority of the stock independently of the three hundred shares, said shares shall be transferred to A." A. remained in the employment of the T. company until 1869, when he was dismissed from it, B. actively promoting his dismissal, and notifying A. immediately afterward that their contract must be considered at an end. The decree declared that there was a trust, and ordered that B. should hold the three hundred shares upon the trust that the dividends thereon after Oct. 1st, 1870, belonged and were to be accounted for to A.; and that the three hundred shares were to be transferred to A. as soon as, by purchase, or otherwise, B. became the owner of a majority of the stock. Price v. Minot, 107 Mass. 49.

title in himself, and has for years suffered the real owner to treat the stock as his own, he is bound to make inquiry as to the state of the title before he purchases, and afterward to give notice to the corporation of his having become the beneficial owner, before he can be protected as such.¹ Where stock is transferable only on the books of the corporation, and a production of the certificate is not required to obtain dividends upon the shares, as long as the corporate books contain evidence that the person who received the certificate is still to be regarded as owner of the shares, the corporation has an authentic record upon which it can lawfully act in determining the disposition which shall be made of the dividends. Where, therefore, the assignor of stock which was not transferred on the books, died, and dividends were paid to his administrator, it was held that the corporation was not liable to the assignee for their amount.²

By a stock contract, seller's option, the seller assumes to have the shares and to make a present sale of them, and to hold them for the benefit of the purchaser until delivery. The purchaser is therefore entitled to dividends accruing between the sale and delivery. When the vendor gives notice of his readiness to deliver on a certain day within the option, the time for delivery becomes fixed, and the rights of the parties determined. If, pending the exercise of his option by the seller, the company declares a stock

¹ *Sabin v. Bank of Woodstock*, 21 Vt. 353. The holder of the equitable title to stock of which the corporation has notice, has a right in equity to the dividends subsequently accruing upon it. *Conant v. Seneca County Bank*, 1 Ohio St. 298.

² *Brisbane v. Delaware, Lackawanna, etc., R.R. Co.*, 25 Hun, 438. See *Smith v. Am. Coal Co.*, 7 Lansing, 317; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Manning v. Quicksilver Mining Co.*, 24 Hun, 360. Where, although

the stock was not transferred on the books of the corporation, it appeared that the purchasers were the president and a trustee of the corporation, and that the corporation paid the dividends on the stock to them, the payments being entered in the dividend book and the ledger of the corporation to their credit, it was held that the seller of the stock was not liable for an unpaid balance thereon. *Cutting v. Damarel*, 88 N. Y. 410, reversing S. C. 23 Hun, 339.

dividend conditioned upon a cash payment, the purchaser, to avail himself of the dividend, must make the payment, the seller being under no obligation to do so.¹ A dividend declared, but not paid, belongs to the then owner of the stock, and a sale of the stock afterward will not carry the dividend with it though it be not payable until after the sale.² A person who buys stock on an option, is not entitled to dividends which are declared before he exercises his option, though they may have been declared after the making of the contract, and are not payable until after he exercises his option.³ But when a corporation declares two dividends, one payable on a day certain, and the other at the option of the agent, both dividends belong to the party holding the stock when the dividend is declared.⁴ By a resolution, the treasurer of a corporation was directed to carry to the account of each stockholder the interest annually. It was held that such annual dividends, whether in stock or money, became separated from the principal, was the distinct property of the then holder of the stock, and did not pass to the purchaser by a subsequent transfer of the stock.⁵

§ 216. When profits deemed capital and when income.—
Unless restrained by statute, a corporation may treat

¹ Currie v. White, 45 N. Y. 822, reversing S. C. 1 Sweeny, 166.

² Spear v. Hart, 3 Robertson, 420; Bright v. Lord, 51 Ind. 272. But see Burroughs v. North Carolina R.R.Co., 67 N. C. 376.

³ Bright v. Lord, *supra*. See City of Ohio v. Cleveland, etc., R.R. Co., 6 Ohio St. 489; Jones v. Terre Haute, etc., R.R. Co., 29 Barb. 353; March v. Eastern R.R. Co., 43 N. H. 515.

⁴ Hill v. Newichawanick Co., 48 How. Pr. 427.

⁵ City of Ohio v. Cleveland, 6 Ohio St. 489. Where the action is not upon

the stock *per se*, nor for dividends, but upon a contract by which the corporation obligated itself to pay certain specified sums at certain times, in consideration that the plaintiff had taken stock of the company, the certificates of the stock do not form the basis of the action, but are only evidence tending to show that the plaintiff was the holder of stock, which fact may be proved by other competent evidence, as well as by the certificates. Bates v. Androscoggin, etc., R.R. Co., 49 Me. 491.

money earned either as an increase of its property or as profits. While the corporation holds it as a part of the corporate property, it is capital and not income of that share, as between the tenant for life and remainder-man. When a distribution of such earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock or a division of profits depends upon the substance and intent of the action of the corporation as shown by its votes.¹ Notwithstanding the profits of a corporation have been accumulating for many years until the market value of the stock is more than double its original price, and the owner dies directing the income of his estate to be applied to particular objects for limited periods, these extraordinary accumulations are as much a part of his capital as any other portion of his estate, and must, therefore, be regarded as forming a part of the principal from which the future income is to arise.² When shares in a bank are conveyed by A., the owner, to B. in trust to pay the dividends thereon, as the same are declared to A., and after A.'s death to transfer and convey said shares to the heirs of C., the net earnings of the bank remain the property of the bank as fully as its other property until a dividend is declared, and the tenant for life has no title to them prior thereto.

¹ Rand v. Hubbell, 115 Mass. 461; Phelps v. Farmers', etc., Bank, 26 Conn. 269. In Bardwell v. Sheffield Waterworks Co., L. R. 14, Eq. 517, MALINS, V. C., said: "The question is whether the sum paid for interest on the sums borrowed and the dividends on the preference shares during the time when the capital remained unproductive are to be attributed to income or capital. I think it is clear that if the works had been performed by a contractor in the usual way, he would either have arranged his prices

so as to include in the profits the interest on the capital and plant employed by him, or would have added interest on capital to the amount of his estimates. Therefore, in either case, the interest on the capital employed would be found in the price paid for the work. In the present case, the company having performed the work, have been compelled to pay interest on the unproductive capital, and I think the interest so paid formed part of the capital employed in the work."

² Earp's Appeal, 28 Pa. St. 368.

But the nature of the dividends remains the same, and when they are distributed, the tenant for life is as much entitled to them as though they had been divided the moment they were earned. Net earnings which are retained by the directors as a reserve fund to meet contingencies are sometimes spoken of as capital, irrespective of the source whence they are derived. When, however, the necessity for the reservation ceases, and the reserve fund is divided among the shareholders, the question whether it is income or capital depends on its origin and the character of the transaction.¹ The proceeds of real estate of a corporation

¹ Lord v. Brooks, 52 N. H. 72. See Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 Id. 637. The following rule was laid down by the Court of Chancery of New Jersey:—Where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant are invested in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital. This, as well as the par value of the shares, must be kept by the trustees intact for the benefit of the remainder-man. But the earnings on such capital, as well as upon the par value of the shares, belongs to the life tenant. When an extra dividend is declared out of the earnings or profits of the company, it belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital. Van Doren v. Olden, 19 N. J. Eq. 176. The substance of some of the English decisions is, that, as between the legatee for life of bank stock and a

remainder-man, any extraordinary dividend of profits made by the bank is regarded as an accretion to the capital, unless clearly made as a dividend only, and the legatee for life will take only the interest upon such accretion. Brander v. Brander, 4 Ves. 800 and note; Paris v. Paris, 10 Id. 185; Clayton v. Gresham, Ib. 288. Vice-Chancellor SHADWELL, in Price v. Anderson, 15 Sim. 473, held that a dividend of twelve and a half per cent. declared out of the profits of the Royal Exchange Assurance Company, which was in addition to the usual dividend of two and a half per cent. declared at the same time, went to the life tenant. The same vice-chancellor held, in Preston v. Melville, 16 Sim. 163, that the life tenant was entitled to a bonus of one per cent. declared as a bonus by the Bank of England out of the interest and profits, in addition to the half-yearly dividend of three and a half per cent. declared at the same time. Sir Knight BRUCE, two years subsequently, in Johnson v. Johnson, 15 Jur. 714 (5 Eng. L. & Eq. 164), held that a bonus or increased dividend of ten per cent., in addition to the usual dividend of five per cent., should go to the widow to whom the testator had bequeathed the income for her life.

taken by right of eminent domain belong to the capital, and not to the income of a trust fund invested in the shares of the corporation.¹ The same is true of money derived, not from the earnings and accumulations of the corporation, but from a sale of its rights, franchises, and permanent property.² If, however, a legacy is given of the dividends or income upon stock in a land company which is known to derive its profits and declare its dividends from the avails of the sales of the property which constitutes its capital stock, the legacy will nevertheless include all such dividends, as they are the ordinary and principal ones land companies are expected to make.³

As a general rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the corporation, and of course entitle the holder to vote, unless it is otherwise provided in the charter or by-laws.⁴

¹ Heard v. Eldredge, 109 Mass. 258.

² Gifford v. Thompson, 115 Mass. 478; Vinton's Appeal, 99 Pa. St. 434; Biddle's Appeal, Ib. 278.

³ Reed v. Head, 6 Allen, 174. In this case a testatrix in her will gave shares of stock in certain land companies to A. and B. in trust, the income and dividends of which were to be paid to them during their lives, and at their death the stock was to go to their heirs. It was held that the legatees for life were entitled to the proceeds of the sales of the property, notwithstanding the whole capital stock might thereby be exhausted in their lifetime.

⁴ Bailey v. Railroad Co., 22 Wall. 604. In England and Massachusetts dividends made by the way of issuing additional shares of stock are regarded simply as augmentations of the capital of the corporation and as forming no part of the income of the estate receiving such stock as between the tenant for life and remainder-man. In New York and some of the other States

when stock is created solely by the surplus earnings of the corporation, it is considered practically as so much money, and to be disposed of accordingly. Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 Id. 637; Hyatt v. Allen, 56 N. Y. 553; Earp's Appeal, 28 Pa. St. 368; Simpson v. Wiltbank's Appeal, 64 Id. 256; Van Doren v. Olden, 19 N. J. Eq. 176; Lord v. Brooks, 52 N. H. 72; Riggs v. Cragg, 26 Hun, 89. It was said by the Supreme Court of Pennsylvania that when a corporation, having actually made profits, proceeds to distribute them among the stockholders, the tenant for life is entitled to receive them without regard to the form of the transaction; equity, which disregards form and grasps the substance, awarding the thing distributed, whether stock or money, to the person entitled to the profits. Moss's Appeal, 83 Pa. St. 264. In an earlier case in the same State it was held that accumulations on corporate shares after the death of a testa-

A corporation by vote increased its capital stock by creating new shares, declared a cash dividend equal in amount to the par value of the new stock, and authorized its treasurer to receive dividend checks in payment for the new shares. It was held that, as between a tenant for life and the remainder-man, these new shares were capital and not income.¹ A trust fund which by the terms of the trust was to pay the income to A. for life, remainder to B., included shares of stock in a railroad company. During the existence of the trust the company accumulated earnings with which it bought up its own stock in the market. It subsequently increased its capital stock by creating new shares, giving stockholders the option, up to a certain date, of taking these new shares at par, and, after that date, the balance of the new shares not so taken were to be sold for cash. It then declared a dividend on all stock held before the creation of the new shares, payable one-half in the old stock which the company had purchased, and one-half in cash proceeds from the sale of the new stock. It was held that of the dividend thus paid the trustee, the half in the old stock of the company should go to the life tenant as income, and the half derived from the proceeds of sale of new stock should be added to the principal of the trust fund.² Where it was not lawful for a corporation to make stock dividends, a company by vote increased its capital

tor, though in the form of certificates of stock, were to be deemed income. Earp's Appeal, 28 Pa. St. 368.

¹ Rand v. Hubbell, 115 Mass. 461. When a corporation has power to increase its capital, it is immaterial whether such increase is made by awarding the stock to stockholders as dividends in lieu of money, retaining the money for the purposes of the corporation; or by paying the stockholders the dividends in cash from the earnings of the corporation, and selling the stock

in the market to raise money for the use of the corporation. Howell v. Chicago, etc., R.R. Co., 51 Barb. 378.

² Leland v. Hayden, 102 Mass. 542. See Minot v. Paine, 99 Mass. 101; Ashurst v. Field, 26 N. J. Eq. 1; Van Doren v. Olden, 19 Id. 176; Richardson v. Richardson, 75 Me. 570; Roberts' Appeal, 92 Pa. St. 407; Riggs v. Cragg, 26 Hun, 89; Peirce v. Burroughs, 58 N. H. 302; New England Trust Co. v. Eaton, 140 Mass. 532; Parker v. Mason, 8 R. I. 427.

stock by creating three thousand new shares. It then declared a cash dividend of forty per cent., and by vote authorized its treasurer to receive such dividends in payment for shares of the new stock at the option of the old stockholders. The stock which the shareholders were thus authorized to take was \$163 per share. It was held that though this was nominally a cash dividend, it was the duty of a trustee whose *cestui que trust* held a life interest in the old stock to take stock certificates in the new stock for the dividend, and that they would belong to the capital of the trust fund.¹ When a corporation, having voted to increase its capital stock, the additional shares are allotted to the existing stockholders *pro rata*, and the privilege of subscribing for the new shares at par is sold for a *bonus*, such *bonus* must be regarded as a part of the *corpus* of the shares to which the new stock has been allotted, and not as income; and if the shares are left in trust for the benefit of A. during his life, remainder to B., the *bonus* will be treated as a part of the principal of the trust, the income only from which will go to the life tenant.²

§ 217. Statute of Limitations.—Where the directors of a corporation pass a dividend to the credit of a stockholder and there is no demand by him, or refusal, or notice to the shareholder that his dividend is denied, the possession of the fund by the corporation is in the nature of a trust, and

¹ *Deland v. Williams*, 101 Mass. 571.

² *Atkins v. Albree*, 12 Allen, 359. C. by her will created a trust of her estate, directing the trustees to pay her daughter the sum of \$1,400 per annum out of the income and profits, and to her son the remainder of the income. After the death of C. two corporations in which she owned stock constituting a part of the trust estate, resolved to increase their capital by an issue of new

stock, to be subscribed and paid for by the stockholders. The trustees sold the right to subscribe for stock in one company, and subscribed and paid with their own money for stock in the other company. They sold the stock subscribed for at a premium and credited the trust fund with the sums made in both cases. It was held that the profits thus realized by the trustee belonged to the income of the trust. *Wiltbank's Appeal*, 64 Pa. St. 256.

it will not be barred by the statute of limitations. But after a refusal of the corporation to pay and a denial of the stockholder's right, the possession is adverse, and the statute begins to run.¹ When an insolvent corporation assigns all of its property to trustees for the benefit of its creditors and suspends business, the liability of stockholders for unpaid subscriptions becomes fixed, and the statute of limitations begins to run in their favor.² But when a subscription to the stock of a corporation stipulates that each subscriber will pay the amount named by him "in such instalments as may be called for by said company," and the corporation, after carrying on business several months and becoming financially embarrassed, executes a deed of assignment to trustees of all of its property, including unpaid subscriptions, in order to secure its creditors, the statute of limitations in favor of the stockholders does not commence to run until an assessment and call for the unpaid subscriptions made by a decree in equity on a bill filed by creditors.³

¹ *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Phila., etc., R.R. Co. v. Cowell*, 28 Pa. St. 329; *Barnard v. Vermont, etc.*, R.R. Co., 7 Allen, 512.

² *Glenn v. Dorsheimer*, 23 Fed. Rep. 695; 24 Id. 536; *Payne v. Bullard*, 23 Miss. 88; *Allibone v. Hagar*, 46 Pa. St. 48; *Harmon v. Page*, 62 Cal. 448. See *Terry v. Anderson*, 95 U. S. 628; *Gilliland v. Union Canal Co.*, 109 Id. 401; *Canada Southern R.R. Co. v. Gebhard*, Ib. 527.

³ *Glenn v. Semple*, Cent. L. J. for Feb. 19, 1886, vol. 22, p. 182. In this case the subscription was made by the defendant in 1866, and the deed of assignment executed by the corporation the same year. A creditor's bill was filed in the Court of Chancery in December, 1871, and nine years subsequently a decree was rendered that thirty per cent. of the par value of each share of the stock should be assessed

and called for, this sum being required to pay the corporate debts. The court below charged that the statute of limitations began to run in favor of the stockholders from the time of the execution of the assignment by the corporation in 1866. The Supreme Court of Alabama, in reversing the judgment, said: "It may be regarded as axiomatic that it was the duty of the directors of this corporation, as faithful fiduciary agents, to administer with fidelity the trust which they had assumed. Among the plain duties imposed upon them by law was to see that the property of the company was honestly appropriated to the payment of its just debts. The unpaid subscription to stock was a trust fund in their hands pledged for this purpose. They had the lawful authority to make a call for so great a percentage of these subscriptions as was needed to discharge these

The statute of limitations on coupons begins to run from their maturity, and not from the maturity of the bonds with which they are issued.¹ The personal liability of a stockholder under a charter providing that he shall be so bound, is that of contract.² Shortening the time within

corporate liabilities, and their duty was commensurate with their power. This duty, it is made to appear, they neglected to perform. And in view of such negligence and inaction on their part, it devolved upon a court of equity on proper application to afford the requisite relief. It is a part of the inherent and original jurisdiction of such courts to compel the execution of trusts, and no plainer or more conspicuous illustration³ of this principle can be found than the frequent cases in modern times where they have by a strong arm coerced the proper application of the assets of insolvent corporations to the satisfaction of their debts. It is now accordingly well settled that courts of equity may enforce the payment of stock subscriptions where the directors have neglected or refused to make assessments and calls for them in the exercise of their proper fiduciary duty.

. . . . The question as to when the statute of limitations commenced to run depends in this case upon a proper construction of the contract of subscription. The promise of the defendant was to pay in such instalments as may be called for by the board of directors of the company; which means in such sums and at such times as they might thereafter declare to be necessary. . . . The defendants' contract, therefore, was not to pay absolutely or at all events, but upon a contingency, this contingency to be determined by the directors of the company, who were the mere agents of the stockholders, or, in the event of their neglect or refusal to act, by the decree

of a court of chancery. The settled rule is, that where money is to be paid, or a thing is to be done, upon the happening of a contingency or uncertain event, no limitation can run until the contingency happens, or the event takes place." SOMERVILLE, J., referring to Glenn v. Williams, 60 Md. 93; Sawyer v. Upton, 91 U. S. 56; Hall v. U. S. Ins. Co., 5 Gill, 484; Hatch v. Dana, 101 U. S. 205; Word v. Griswoldville Manf. Co., 16 Conn. 593; Dalton, etc., R.R. Co. v. McDaniel, 56 Ga. 191; Scovill v. Thayer, 105 U. S. 143; Savage v. Medbury, 19 N. Y. 32; Howland v. Edmunds, 24 Id. 307; Howland v. Cuyendall, 40 Id. 320; Kilbrath v. Gaylord, 34 Ohio St. 305; Hope v. Mut. Ins. Co. v. Weed, 28 Conn. 51; Warner v. Beem, 36 Iowa, 386; Western R.R. Co. v. Avery, 64 N. C. 491; Curry v. Woodward, 53 Ala. 370.

¹ Clark v. Iowa City, 20 Wall. 583; Nash v. Eldorado County, 24 Fed. Rep. 252; Amy v. Dubuque, 98 U. S. 470; Walnut v. Wade, 103 Id. 683; Ohio v. Frank, Ib. 697; Koshkonong v. Burton, 104 Id. 668.

² Terry v. Calman, 13 S.C. 220; Lindsay v. Hyatt, 4 Edw. Ch. 97; Longley v. Little, 26 Me. 162; Baker v. Atlas Bank, 9 Metc. 182; Davidson v. Rankin, 34 Cal. 503; Handy v. Draper, 89 N. Y. 334; Norris v. Wrenschall, 34 Md. 492; Carroll v. Green, 92 U. S. 509; Terry v. McLure, 103 Id. 442. *Contra*, Bullard v. Bell, 1 Mason, 243; Gridley v. Barnes, 103 Ill. 211; Diversey v. Smith, Ib. 378. In New York, where the statute made the stockholders con-

. which actions on existing contracts must be brought, does not impair the obligation of the contract, if a reasonable time is given to bring a suit before the bar attaches.¹

§ 218. Application of dividend to indebtedness of stockholder.—Dividends declared by a corporation on shares of a stockholder indebted to it, may be retained by the corporation toward the satisfaction of the debt. Such a rule does not affect the free sale and transfer of shares, the dividend not passing with the transfer.² B., a stockholder of a bank who was indebted to it, executed and delivered to the president of the bank a power of attorney in blank. A call was made on the stockholders to pay an instalment on their stock on or before a day named, which B. failed to do. Subsequently B. authorized the president to transfer his stock to S., at the same time paying his indebtedness to the bank. An action was brought by B. to recover from the bank the amount of two dividends which had been declared between the time of the call for the instalment and the date of the assignment by B. of his stock to S. The stock was deposited with the bank as a pledge to secure the payment of a loan to B., with interest. The bank had no right to appropriate the pledge, or any part of it, without the consent of B.; and he had no power to dispose of the shares with-

tinuously liable for all debts of the corporation, one of the grounds on which the court placed the obligation was that of contract. *Corning v. McCullough*, 1 Coms. 47; *Storey v. Furman*, 25 N. Y. 222. As to the statute of limitations in suits against directors, see *Losee v. Bullard*, 79 N. Y. 404; *Duckworth v. Roach*, 81 Id. 49; *Brinckerhoff v. Bostwick*, 99 Id. 185; *Spering's Appeal*, 71 Pa. St. 11; *Williams v. Halliard*, 38 N. J. Eq. 373.

¹ *Terry v. Anderson*, 95 U. S. 628; *Gilligan v. Union Canal Co.*, 109 Id. 401.

² *Bates v. N. Y. Ins. Co.*, 3 Johns. Cas. 238; *King v. Paterson, etc.*, R.R. Co.,

29 N. J. 504; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Hagar v. Union Nat. Bank*, 63 Me. 509. See *MERCHANTS' BANK v. Shouse*, 102 Pa. St. 488. Where the articles of a banking association provide that dividends of so much of the profits and interest of the association as shall be deemed expedient by the directors shall be declared, a person who has given a bond and mortgage in payment for his shares of stock, cannot restrain the bank from collecting interest due on the mortgage because he has been paid no dividends. *Ely v. Sprague Clarke*, N. Y. Ch. 251.

out the consent of the bank. The bank had no money in its hands belonging to B. to pay the instalment, and was under no obligation to advance money for that purpose. It was held that B., by his refusal or neglect to pay the instalment, forfeited his claim to the two dividends.¹

§ 219. Right to transfer shares.—Dominion over a thing implies the power to dispose of it at pleasure ; and the power of disposing of stock in a corporation, like the power of disposing of any other personal property, is incident of common right to the ownership of it.² This right may be

¹ *Marine Bank v. Biays*, 4 Har. & Johns. 338. Where articles of association provide that no transfer of stock shall be permitted or be valid until all the instalments thereon are paid, and a party buys shares not paid up, the corporation may apply dividends on such stock to the payment of an indebtedness of the original owner. But, upon payment of all of the instalments, the assignee has a right to have the stock transferred to him, without being obliged to pay a debt which the assignor may still owe the corporation. *Bates v. New York Ins. Co.*, *supra*.

² *Huddersfield Canal Co. v. Buckley*, 7 Term Rep. 36; *Croxtón's Case*, 1 De G. M. & G. 600; *Mayhew's Case*, 5 Id. 837; *Sutton's Case*, 3 De G. & Sm. 262; *Middletown Bank v. Magill*, 5 Conn. 28; *Brightwell v. Mallory*, 10 Yerg. Tenn. 196; *State v. Franklin Bank*, 10 Ohio, 91; *Cole v. Ryan*, 52 Barb. 168; *La Grange, etc., R.R. Co. v. Rainey*, 7 Coldw. Tenn. 420; *Boston Music Hall v. Cory*, 129 Mass. 435; *Bank of Attica v. Manufacturers'*, etc., *Bank*, 20 N. Y. 501; *Johnson v. Underhill*, 52 Id. 203; *Burrall v. Bushwick R.R. Co.*, 75 Id. 219; *Cowles v. Cromwell*, 25 Barb. 413; *Miller v. Gt. Republic Ins. Co.*, 50 Mo. 55. An act of incorporation provided that "the lands, tenements, stock, property, and

estate of the Cape Sable Company is and shall be held as real estate, and shall descend as such, agreeably to the acts of Assembly in such cases made and provided, when not otherwise disposed of." It was held that the mere perishable personal property was as much a part of the stock property and estate of the company as its lands and tenements ; but that it was the intention of the act that it should only be so held as regarded the interests of the stockholders themselves ; not that the actual legal character of the perishable movables should be changed in regard to the rights and interests of all other persons. The Cape Sable Co.'s Case, 3 Bland Ch. 670. The whole estate of the Chesapeake and Ohio Canal Company, at least so far as it consists of the canal and its necessary buildings, and the fixtures attached to them, must, at common law, be deemed realty, and it was so considered by the original act of incorporation ; but by a subsequent statute it was provided that it should be deemed personal property. *Binney's Case*, 2 Bland's Ch. 145. Although the acts of Virginia and North Carolina incorporating the Dismal Swamp Canal Company declared that shares in the company should be deemed real property, yet it was not the intention to make such shares lia-

restrained by the charter or by a general law; but courts usually construe clauses of this nature with reference to the particular purpose for which they are inserted, and give

ble for debts as real estate, but only to give them an inheritable quality. *Cooper v. Dismal Swamp Canal Co.*, 2 Murphey, 195. It was held in Connecticut in 1818, that shares in an incorporated turnpike company were real estate. The court remarked that the right to tolls was a right issuing out of real property, annexed to and exercisable with it, and came within the description of an incorporeal hereditament of a real nature; that the stockholders as members of the company were owners of the turnpike road; that it was in virtue of this interest they were entitled to dividends, or their respective shares of toll; and that it was not a mere claim on the corporation. *Welles v. Cowles*, 2 Conn. 567. This was recognized as law four years afterward in a suit between the same parties, though the question was not expressly raised, in 4 Conn. 182. See *Hurst v. Meason*, 4 Watts, 346. In 1838, the Court of Appeals of Kentucky held that the stock in the Lexington and Ohio Railroad Company was real estate. "The right conferred on each shareholder," said the court, "is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and though it springs out of the use of personality, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament." The Supreme Court of Massachusetts held, in 1798, that shares in incorporated bridge and canal companies were personality. It was argued in behalf of this view, that the estate could only exist in the corporation which alone could acquire it, alone be seized or possessed of it, alone pass it away, manage, or repair it, and so must hold it entire; that its tenure was to its successors, or successors and assigns; that the estate could never vest in, or be divided among, the individual members to hold as tenants in common in their private capacities; that only the corporation could possess the estate, and that only by possessing the charter; that only the corporation could be taxed for it on common law principles; and that on these alone could it be taken in execution for the debts of the corporation. *Russell v. Temple*, 3 Dana's Abr. 108. In Ohio, the general policy has been to treat shares in incorporated companies as personality. They are recognized as such in several acts of the legislature, and the distinction between the estate of the company and the individual rights of the stockholder, was taken at an early day. By the act of Feb. 8, 1826, amendatory of the general turnpike law (Swan's Sts. 982), the right of turnpike companies to take tolls was subjected to sale on execution to pay corporate debts; but the shares of the members were never thus subjected to pay individual debts. On the contrary, the mode of procedure as to such shares was by bill in equity filed under the 16th section of the chancery act of 1831 (Swan's Sts. 704), which gave the court power to decree a sale of any interest, shares or stock, owned by a judgment debtor in any banking, turnpike, bridge, or other joint stock company; thus subjecting these shares the same as choses in action. *Johns v. Johns*, 1 Ohio St. 350, per THURMAN, J. "Shares in the property of a corporation," says Greenleaf, in his *Cruise on Real Property*, second edition, 40,

them effect only to that extent.¹ A by-law of a corporation not expressly authorized by the charter forbidding the transfer of its stock, or putting restrictions on its transfer, is void.² But where it is provided that a transfer shall be approved by the board of directors, courts will hesitate to interfere with the discretion of the directors, unless they are acting capriciously.³ The unreasonable exercise by the directors of the power to restrain transfers, will be controlled by a court of equity.⁴ Under the national banking act, a stockholder has the unrestricted right to make a sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of as-

41, "are real or personal property according to the nature, object, and manner of the investment. When the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river, and render it navigable, to open new channels, etc., to make a canal, erect water-works, and the like, as was the case in the New River Water, the navigation of the River Avon, and some others, and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll bridge, canal, and turnpike corporations, by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. But where the property originally intrusted is money to be made profitable to the contributors by applying it to certain purposes in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the

shares in the stock are deemed personal property, and as such are in all respects treated. In modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate." Shares of stock may be the subject of conversion, and their value be recovered by action. *Kuhn v. McAllister*, 1 Utah T. 273; and it has been held that they are included in the phrase in the statute of frauds, "goods, wares, and merchandise." *Fine v. Hornsby*, 2 Mo. App. 61.

¹ *Chouteau Spring Co. v. Harris*, 20 Mo. 382. See *Guiner v. Marblehead Soc. Ins. Co.*, 10 Mass. 476; *Bank of Utica v. Wager*, 2 Cowen, 712.

² *Moore v. Bank of Commerce*, 52 Mo. 377; *Weston's Case*, L. R. 4, Ch. 20; *Farmers'*, etc., *Bank v. Wasson*, 48 Iowa, 339; *Gibbert's Case*, L. R. 5, Ch. 559. See *N. Y. & N. H. R.R. Co. v. Schuyler*, 34 N. Y. 30; *Downing v. Potts*, 3 Zab. 66.

³ *Walker's Case*, L. R. 2, Eq. 554; *Shepard's Case*, L. R. 2, Ch. 16; *Penney, ex parte*, 8 Id. 446.

⁴ *Robinson v. Chartered Bank*, L. R. 1, Eq. 32.

suming the liability of a corporator. Yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the assignor knows will make the transfer, if it is sustained, work a fraud upon the other stockholders, or upon the creditors of the bank. In the absence of fraud, this right is not subject to a denial by the directors, or by the other shareholders. It is the duty of the bank to make the transfer, and in this respect it is liable for the wrongful acts and omissions of its officers.¹ A by-law prohibiting the owner of shares who is indebted to the corporation to transfer his stock is valid, though contrary to the general law of the State in relation to the transfer of property.² A stockholder who borrows money from a bank with a knowledge of a usage of the bank not to permit a transfer of shares while the stockholder is indebted to the bank, will be bound by such usage, and neither he nor his assignee, under a general assignment for the benefit of creditors, can maintain an action against the bank for refusing to transfer. Whether such an action could be sustained by a *bona fide* purchaser of the stock for a valuable consideration and without notice would be a different question.³ In *Van Sands v.*

¹ *Johnson v. Laflin*, 5 Dillon, 65; 103 U. S. 850; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Case v. Bank*, 100 U. S. 446; *McAllister v. Kuhn*, 96 Id. 87. See *N. Y. & N. H. R.R. Co. v. Schuyler*, 38 Barb. 534.

² *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513. See *Tuttle v. Walton*, 1 Ga. 43; *McDowell v. Bank of Wilmington*, 1 Harr. Del. 27; *St. Louis Ins. Co. v. Goodfellow*, 9 Mo. 149; *Nesmith v. Bank of Washington*, 6 Pick. 329; *Plymouth Bank v. Bank of Norfolk*, 10 Id. 454; *Bank of Attica v. Manufacturers' Bank*, 20 N. Y. 501; *Pendergast v. Bank of Stockton*, 2

Sawyer C. C. 108; *Vicksburg, etc., R.R. Co. v. McKeen*, 14 La. An. 724.

³ *Morgan v. Bank of North America*, 8 Serg. & Rawle, 73. To entitle a purchaser to the protection of a court of equity as against the legal title or a prior equity, he must not only be a purchaser without notice, but for a valuable consideration paid. Mere security to pay the purchase price, or the mere existence of a precedent debt, is not a sufficient consideration to support a conveyance as against prior equities; though in some of the States it is held that when made in absolute payment and satisfaction of an antecedent debt, the purchase will be regarded as made

Middlesex Co. Bank,¹ the certificate of stock stated upon its face that it was transferable at the bank, subject, nevertheless, to the stockholder's indebtedness and liability to the bank according to the charter and by-laws. The charter authorized "the stockholders to establish by-laws and regulations for the well ordering of the concerns of the bank, and make the stock transferable according to its rules." It was held that although no by-law had been adopted on the subject, the condition being simply in the certificate, it must nevertheless be considered that the stock was issued and received upon this condition, which therefore constituted one of the terms of the contract when the stock was acquired, and that the restriction was valid on that ground. This form of certificate had been adopted in practice at the organization of the bank some fifteen years before. Under a banking law that "all debts actually due and payable to the corporation by a stockholder requesting a transfer of his stock, must be satisfied before a transfer shall be made, unless the president and directors shall direct the contrary," the assignee of stock is presumed to have taken his assignment subject to the rights of the bank against the stockholder, of which he is bound to take notice. But such a lien would not attach to paper not due at the time the transfer was demanded.² The act

for value; and the relinquishment of a valid security which the purchaser before held for his debt, and which cannot be recovered so as to place him in the same situation substantially as to security as he was in prior to his purchase, may entitle him to the protection of a *bona fide* purchaser without notice. *Weaver v. Barden*, 49 N. Y. 286. A person who buys in good faith from an executor, stock in a corporation, paying for it a valuable consideration, or loans money on it, is under no obligation to see that the money

is faithfully applied by the executor. *Leitch v. Wells*, 48 N. Y. 585.

¹ 26 Conn. 144.

² *Ruse v. Bank of Com.*, 14 Md. 271. When the articles of association specify that "no share of stock shall be transferred, unless the shareholder shall have previously discharged all debts due by him to said association," the words "debts due" are employed to signify debts presently payable; and to justify the company in refusing to transfer stock on the ground of the indebtedness of the holder, the debt must

of Pennsylvania of 1813 regulating banks, provided that no stockholder indebted to a bank should make a transfer or receive a dividend until such debt was discharged, or security to the satisfaction of the directors given for the same. It was held that the words "indebted to the Institution," in the statute, embraced all debts, and were not limited to indebtedness on account of the original subscription to the capital stock, and included the drawer of a note discounted at the bank, but not payable when the transfer was requested, as well as debts actually due and unpaid.¹ A testator, who owned shares in a bank in Boston, constituted his wife executrix, and left her in his will all of his property during her life, with directions that no part of the bank stock should be disposed of, unless her comfort required it. She gave a power of attorney to a citizen of Boston, authorizing him to sell the shares in the bank there, which was accordingly done, and a transfer of them made to the purchaser in due form on the books of the bank. It was held in an action against the bank for negligence, that although the bank must be presumed to know what were the legal powers of an executor, yet it could not be presumed to know the particular provisions of each will, and if an ex-

be due and payable at the time the right to refuse the transfer is claimed. *Leggett v. Bank of Sing Sing*, 25 Barb. 326. See *Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149. Although a banking corporation has provided in its articles of association and by-laws that no stockholder shall assign or transfer his stock while indebted to the bank, such liability having been created previously and not upon the security of the stock, yet if the bank adopts and issues to the stockholder a form of certificate wholly omitting reference to the restriction, and stating that no transfer is to be made on its books except upon return of the certificate in person, or by attorney, with a blank form of assign-

ment and power of attorney printed on the back of the certificate, and such stockholder signs his name to the blank assignment and power of attorney, and delivers the certificate upon sale or pledge to a third person for value who has no other knowledge than what the certificate contains, the assignee acquires an equity paramount to that of the bank, and can compel the bank to transfer the stock to him. *Lee v. Citizens' Nat. Bank*, 2 Cincinnati, 298. See *Driscoll v. West Bradley, etc., Manuf. Co.*, 59 N. Y. 96.

¹ *Rogers v. Huntingdon*, 12 Serg. & Rawle, 77; *Grant v. Mechanics' Bank*, 15 Id. 140.

ecutor had power to transfer shares, it was not bound to see to the application of the proceeds, much less to decide, as a matter of fact, and at its peril, what were the wants of the widow.¹ A transfer of shares to a person who, in consequence of his insolvency, could not fulfil his obligations as a stockholder, would be void as to the creditors of the corporation.² Upon the dissolution of the corporation, the right to transfer the shares no longer exists.³

¹ Hutchins v. State Bank, 12 Metc. 421.

² Bowden v. Santos, 1 Hughes, 158; Nathan v. Whitlock, 9 Paige Ch. 152; s. c. 3 Edw. Ch. 215; Burke v. Smith, 16 Wall. 390. In an early case in Missouri it was decided that a corporation, under the power to regulate the transfer of shares, could not prevent a party from selling his stock even to an insolvent person. Chouteau Spring Co. v. Harris, 20 Mo. 382. In Everhart v. West Chester, etc., R.R. Co., 28 Pa. St. 339, it was held that a transfer of stock by a subscriber in order to escape liability upon it, without the consent of the company, was not a good defense to an action against him by the company to recover the amount subscribed. WOODWARD, J., in delivering the opinion, said: "Two of us think the defendant had a perfect legal right to assign his stock on any terms he pleased, but that, unless it was done with the consent of the company, he remained liable still to them as a stockholder for the unpaid portion of his subscription. One of our number is of opinion that if the assignment had been *bona fide*, it would have relieved him from further liability, but that the record showing that it was a transfer *mala fide*, he remains liable. The only remaining judge who sat in the argument holds that the assignment was valid, and relieved the defendant from further liability."

³ *In re Accidental Ins. Co.*, Chap-

pell's Case, L. H. 6, Ch. 902; *In re* same Co., Allin's Case, L. R. 16, Eq. 449; James v. Woodruff, 2 Denio, 574; aff'g S.C. 10 Paige Ch. 540. If, at the time of such dissolution, any of the stockholders are indebted to the corporation, whether such debts are due and payable immediately, or are to become due at a future day, their debts, with a rebate of interest if payable at a future time without interest, must first be applied toward or in part payment of their distributive shares. Nor can the owner in such a case assign his stock to a third person, so as to give the latter any greater or other interest therein than the assignor himself had. And if a party, who is indebted to such corporation, while he is so indebted buys stock of the corporation, which is but a right to a distributive share of the funds, he is placed in the same situation in relation to his right to such distributive share, as though he had become the owner of the stock at the time of the dissolution of the corporation. Ibid. Members of an unincorporated company can, as individuals, hold property, and the vote of the company, with the assent of each member in writing, is binding, and imparts authority to their committee to dispose of the property. When personal property belongs to the members of a voluntary unincorporated company, if a member abandons the association he thereby abandons his interest in the prop-

§ 220. Refusal of corporation to permit a transfer of shares. —A party entitled to the transfer of stock may maintain an action against those whose duty it is to permit the transfer to be made in the manner prescribed, and who refuse.¹ As between the seller and purchaser of stock, the transaction is complete upon the assignment and delivery of the certificate with the power to transfer, and the receipt of payment; and either the purchaser or seller may compel the recording of the transfer on the books of the corporation, or hold it liable for a wrongful refusal.² The by-laws of a corporation required certificates of stock to be authenticated by the president. The certificates stated that they were transferable only at the office of the corporation by the holders or their attorney. Stock being duly assigned to a firm, a member of it called at the office of the corporation in business hours, and the president being absent, he showed to the secretary the assignment and a power of

erty, and those who remain are entitled to such interest. *Curtiss v. Hoyt*, 19 Conn. 154.

¹ *Morgan v. Bank of North America*, 8 Serg. & Rawle, 73; *Union Bank v. Laird*, 2 Wheat. 390; *Rex v. Bank of England*, Doug. 524; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *People v. Crockett*, 9 Cal. 112; *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249.

² *Commercial Bank v. Kortright*, 22 Wend. 348; *s. c. 20 Id. 91*; *Bank of Utica v. Smalley*, 2 Cowen, 778; *N. Y. etc., R.R. Co. v. Schuyler*, 34 N. Y. 80; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Balt., etc., R.R. Co. v. Sewell*, 35 Md. 238; *Bank of Am. v. McNeil*, 10 Bush. Ky. 54; *Johnson v. Laflin*, 5 Dillon, 65; *Purchase v. N. Y. Exch. Bank*, 3 Robertson, 164; *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 461; *Union Building Assoc.*

v. Sendmeyer, 50 Pa. St. 67; *Am. Building Assoc. v. Sutton*, 35 Id. 463; *De Cômeau v. Guild Farm Oil Co.*, 3 Daly, 218; *Noyes v. Marsh*, 123 Mass. 287; *Ross v. Union Pacific R.R. Co.*, 1 Woolworth, 26; *Case v. Bank*, 100 U. S. 446; *Galbraith v. Building Assoc.*, 43 N. J. 389; *Durham v. Monumental Silver Mining Co.*, 9 Oregon, 41. An assignee of stock in a domestic corporation can insist on the transfer of the stock to him on the books, though he derives his title through a foreign executor or administrator. *Middlebrook v. Merchants' Bank*, 3 Keyes, 135. It was held in New York that upon the refusal of a corporation to transfer shares by reason of a by-law which was not in the articles of association, the assignee might recover the value of the shares, and was not restricted to compelling an actual transfer. *Bank of Attica v. Mansf.*, etc., *Bank*, 20 N. Y. 501.

attorney from the assignor to the assignees, authorizing them to make a transfer on the books of the corporation, and demanded that certificates be issued in the names of the assignees. The secretary declined to do anything in the matter, saying that it was the president's business. Subsequently, on the same day, the corporation caused the same shares to be attached at its own suit against the assignor, he being indebted to it. It was held that a by-law which limited the transfer of stock to be made only at the office of the corporation personally or by attorney, with the consent of the president, was in restraint of trade, and contrary to the general law which permitted the right to personal property to be transferred in various other ways ; that notice to the secretary was sufficient notice to the corporation ; that the president should have been at his post during business hours, and the corporation was not entitled to avail itself of his neglect of duty in its defense ; that it was the duty of the corporation to transfer the shares to the plaintiffs, and it was bound to compensate them for the injury they had sustained ; and that the measure of damages was the value of the shares at the time of the refusal to transfer, with interest from that date.¹ A. bequeathed forty shares of bank stock to his four sons. During the minority of one of the sons, the bank, with notice of the will, permitted the transfer of thirty shares of the stock. It was held that the bank could not refuse to permit a transfer of the ten remaining shares by such minor son, then of age, on the ground that a debt was due by two of the other sons, who were of age when the transfer of the thirty shares was permitted, the brothers not being partners, and each being entitled to one-fourth of the forty shares.² It is

¹ Sargent v. Franklin Ins. Co., 8 Pick. 90 ; S. P. Bond v. Mt. Hope Iron Co., 99 Mass. 505.

² Presbyterian Cong. v. Carlisle Bank, 5 Pa. St. 345. A., B., and C. united

in an agreement for the formation of a stock corporation. The agreement provided for an equal division of the stock among the three incorporators. A. and B. to pay in a certain amount

not a defense to an action for damages against a corporation for refusing to permit a transfer of stock that the certificate was assigned for an illegal consideration.¹ Such refusal amounts to a conversion, and the measure of damages is the value of the stock or its highest price in market at any time after demand and refusal.²

An early decision in England that a mandamus will not be granted to compel a corporation to permit a transfer of shares³ has generally been followed in this country,⁴ but

of cash, and C. to give his notes to A. and to B. individually for the amount of his stock, leaving the stock itself in their hands as collateral. C. was also to give his services as superintendent for a certain length of time at a specified salary. After the corporation was organized and work begun, C. became partially incapacitated from attending to the duties of superintendent. The notes to A. and B. were never given or demanded. The corporation having refused to issue to C. his share of the stock, it was held in an action brought by him against it, that the three were equally interested in the enterprise as projectors, and that the rights and obligations of C. stood substantially on the same footing as those of A. and B.; that upon the organization of the corporation the stock and the right to control the corporate affairs inured to him as well as to them; that though there were some conditions and restrictions qualifying his right to receive the stock, the same was the case with them; that the title to the stock and to an interest in the business was derived from the character of each as a stockholder, and from the original articles of association, irrespective of those conditions. The court, therefore, decreed that C. was entitled to one-third of the original shares of the capital stock, and to all increase, profits, and dividends made or accrued upon the one-third

since the organization of the corporation, and the corporation was directed to issue the stock to the plaintiff. Chater v. San Francisco S. R. Co., 19 Cal. 219.

¹ Helm v. Swiggett, 12 Ind. 194. See De Comeau v. Guild Farm Oil Co., 3 Daly, 218; State Ins. Co. v. Sax, 2 Tenn. Ch. 507.

² Arnold v. Suffolk Bank, 27 Barb. 424; Bridgeport Bank v. N. Y. & N. H. R.R. Co., 30 Conn. 231; Pinkerton v. Manchester, etc., R.R. Co., 42 N. H. 424; German Union Assoc. v. Sendmeyer, 50 Pa. St. Or the amount paid on the stock as dues with interest thereon from the date of payment. North Am. Building Assoc. v. Sutton, 35 Pa. St. 463.

³ Rex v. Bank of England, Douglass, 524.

⁴ Shipley v. Mechanics' Bank, 10 Johns. 484; Fireman's Ins. Co., *ex parte*, 6 Hill, 243; People v. Parker Vein Coal Co., 10 How. Pr. 543; Am. Asylum v. Phoenix Bank, 4 Conn. 172; Wilkinson v. Providence Bank, 3 R. I. 22; State v. Rombauer, 46 Mo. 155; Baker v. Marshall, 15 Minn. 177; Elliot v. Guerrero, 12 Nevada, 105; Stackpole v. Seymour, 127 Mass. 104; Wyman v. Am. Powder Co., 8 Cush. 168; Protection Life Ins. Co. v. Osgood, 93 Ill. 69; Durham v. Monumental Silver Mining Co., 9 Oregon, 41; Freon v. Carriage Co., 42 Ohio St.

there are a few decisions which hold the contrary.¹ "Where the relator merely seeks to be put in possession of corporate shares which have an ascertained market value or which can be bought in the market, and where the incidental rights of ownership (such as eligibility to corporate offices or the right to vote at corporate meetings) do not depend upon the ownership of the specific shares which are the subject of dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of mandamus. The damages which the relator might recover in an action at common law for the violation of his right would be exactly measured by the sum of money which it had cost him or would have cost him to obtain the same right in another way, namely, by purchase; that is to say, with the amount in money of the market value of the shares in dispute, they could be replaced."² A corporation being a trustee to a certain extent of the stockholders, and having in its custody the primary evidence of title to the stock, it may rightfully demand proof of authority to make a transfer before it permits it to be done.³ "The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made either by the stockholders themselves or by persons having authority from them. If, upon the presentation of a certificate for transfer, they are at all doubtful of the identity of the party offering it with its owner, or if not

30; Lamphere v. Grand Lodge, etc., of United Workmen, 47 Mich. 429; State v. Warren Foundry, etc., Co., 32 N. J. 439; State v. People's Building Assoc., 43 Id. 389; Birmingham Fire Ins. Co. v. Com., 92 Pa. St. 72. See Johnson v. Laflin, 103 U. S. 800; 5 Dillon, 65.

¹ Cooper v. Swamp Canal Co., 2 Pa. St. 232.

Murphy, 195; Green Mt., etc., T. Co. v. Bulla, 45 Ind. 1; People v. Crockett, 9 Cal. 112; Townsend v. McIvor, 2 S. C. 25; Campbell v. Morgan, 4 Ill. App. 105.

² AMES, J., in Murray v. Stevens, 110 Mass. 95. See Strasburg R.R. Co. v. Echternacht, 21 Pa. St. 220.

³ Bayard v. Farmers', etc., Bank, 52

satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case and the genuineness of the document in the other to be satisfactorily established before allowing the transfer to be made."¹ B., as trustee, held a certificate for shares of stock in a corporation. By order of court he was removed from his trusteeship and a master transferred the stock on the books of the corporation to B.'s successor. Subsequently, an innocent purchaser of the certificate which B. had held as trustee presented it to the corporation and demanded that the stock which it represented should be transferred to him. It was held that he could not maintain an action against the corporation unless he could show that before the transfer of the stock by the master the person from whom he claimed had acquired from B. a title to it which was good as against B.'s successor, the usage of banks and brokers to advance money upon and to buy and sell on the faith of such paper, to the contrary notwithstanding.²

An action against a corporation for refusing to issue or transfer stock is a convenient common law remedy to obtain compensation in damages in lieu of a proceeding in equity for specific performance. Where equity has jurisdiction, courts have not only decreed that certificates of

¹ Telegraph Co. v. Davenport, 97 U. S. 369; Keppel v. Petersburg R.R. Co., Chase's Decisions, 167. See Central R.R. Co. v. Ward, 37 Ga. 515; Nutting v. Thomason, 46 Id. 34; Machinists' Nat. Bank v. Field, 126 Mass. 345. To create an estoppel against minors on account of the negligence of their guardian in keeping their certificates of stock whereby they were purloined and the names of the minors forged to a blank form of transfer and power of attorney, and a transfer of the stock on the books of the corporation

obtained by a purchaser, there must have been some act or declaration indicating an authorization of the use of their names by which the corporation was misled, or a subsequent approval of the use of their names by accepting the money received for the stock with knowledge of the transfer. *Ibid.*, per FIELD, J. See Pratt v. Taunton Manf. Co., 123 Mass. 110; Machinists' Nat. Bank v. Field, *supra*.

² Sprague v. Cockero Manf. Co., 10 Blatchf. 173.

stock should be issued or transferred, but the payment of accrued dividends.¹

§ 221. Fraudulent transfer of shares.—The power with which a corporation is clothed, as the custodian of the stock-books, to protect the rights of its shareholders, is a trust placed in its hands for the care of individual interests. Like every other trustee it is bound to execute the trust with proper diligence, and is responsible for any injury sustained by its negligence or misconduct.² If it improperly permit shares of its stock to be transferred upon a forged power of attorney, it is bound to issue new certificates to the rightful owner, and account to him for dividends; or, if it has no stock which it can transfer to such rightful

¹ Balt. Passenger R.R. Co. v. Sewell, 35 Md. 238; Chew v. Bank of Balt., 14 Id. 299. See White v. Schuyler, 1 Abb. Pr. N. S. 300; Buckmaster v. Consumers' Ice Co., 5 Daly, 313; Middlebrook v. Merchants' Bank, 41 Barb. 481; 27 How. Pr. 474; 3 Abb. Decis. 295; Hill v. Bank of Rockingham, 44 N. H. 567; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Driscoll v. West Bradley, etc., Manf. Co., 59 N. Y. 96; Cushman v. Thayer Manf. Co., 76 Id. 365; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Freon v. Carriage Co., 42 Id. 30; Johnson v. Brooks, 93 N. Y. 337; Miss., etc., R.R. Co. v. Cromwell, 91 U. S. 643; Draper v. Stone, 71 Me. 175; Coles v. Whitman, 10 Conn. 121; Leach v. Fobes, 11 Gray, 506; Bissell v. Farmers', etc., Bank, 5 McLean, 495; Treasurer v. Com. Mining Co., 23 Cal. 390; Ashe v. Johnson, 2 Jones N. C. Eq. 155. See Ferguson v. Wilson, L. R. 2, Ch. 87. "It is easy to see that a party may become the owner or purchaser of stock in a corporation which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any

market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy in an action for damages in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance on a contract for the sale of real estate and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief." MILLER, J., in Cushman v. Thayer Manf. Co., 76 N. Y. 365.

² Lowry v. Commercial, etc., Bank, Taney's Decis. 310.

owner, it may be compelled to pay him the value of the shares.¹ There may be no actual fault on the part of the corporation, yet the principle results from the justice and expediency in such transactions of casting the loss on those who can best provide against it.² Certificates of stock were issued by a railroad company to V. in 1854, who appeared on the books of the company as the owner of the stock. In the same year V. sold the stock to F. and delivered to him the certificates with blank powers of attorney to en-

¹ Pollock v. Nat. Bank, 7 N. Y. (3 Seld.) 274; Hamilton v. Cent. Ohio, etc., R.R. Co., 44 Md. 551; Pratt v. Taunton Copper Manuf. Co., 123 Mass. 110; March v. Eastern R.R. Co., 43 N. H. 515; Telegraph Co. v. Davenport, 97 U. S. 369; B. & A. R.R. Co. v. Richardson, 18 Cent. L. J. 92, Supm. Ct. of Mass. Where a purchaser is informed by a certificate under the seal of the corporation that the holder is entitled to so much stock which can be transferred on the books of the corporation in person or by attorney when the certificate is surrendered and not otherwise, this is a notification to all persons interested that whoever in good faith buys the stock and produces to the corporation the certificate regularly assigned with power to transfer, is entitled to have the stock transferred to him; and it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificate. If, therefore, a corporation allows its stock to be transferred to other parties while the certificate is in the hands of a *bona fide* holder, it is guilty of a breach of corporate duty for which it will be liable to the injured party. Bank v. Lanier, 11 Wall. 369; N. Y. & N. H. R.R. Co. v. Schuyler, 34 N. Y. 30. Shares of the Bank of England were transferred on the books of the bank under a forged power of attorney. In a suit against the bank by the real

owner to recover dividends on the stock, it was held that the plaintiff was still the legal holder and entitled to the dividends. "But neither can the bank refuse to pay the dividends," said the court, "to those who purchased the stock transferred to them under the forged power. You cannot look further, nor is it the practice even to attempt to look further than the bank books for the title of the person who proposes to transfer to you." Davis v. Bank of England, 2 Bingham, 393. If the holder of shares of stock fills up an assignment on the back of the certificate to transfer only a portion of the shares, and uses due caution in his mode of doing so, and the corporation by its duly authorized officer, the assignment having been altered, transfers all of the shares through carelessness, the corporation will be liable to make good the difference to the original holder. Sewall v. Boston Water Power Co., 4 Allen, 277. Under the statutes of Massachusetts, a contract for the sale or transfer of shares of stock, when the contractor at the time of making the contract is not the owner or assignee of the stock, nor authorized, by the owner or assignee, or by his agent, to make the sale or transfer, is void. Barret v. Mead, 10 Allen, 337.

² Chew v. Bank of Balt., 14 Md. 300; N. Y. & N. H. R.R. Co. v. Schuyler, *supra*.

able him to have the stock transferred upon the books of the company. The certificates were mislaid by F., and they were not found until 1871, after his death. In the meanwhile, in 1863, the board of directors of the company, on the application of V., issued to B. new certificates of stock, on the supposition that the original certificates had been lost by V. On the application of the administrators of F. for the transfer of the stock to their names, and for an account of the dividends which had been declared on the stock, it was held that the issue of these certificates, and the transfer of the stock on which they were founded, was a breach of the duty the company owed to F. as the holder of the original certificates, and rendered it liable to replace the stock, or to account for its value; but that until the company had notice of the transfer of the certificates to F., it was justified in paying the dividends to V. or his assignee.¹ A bank received in good faith from C., as security for a loan, what purported to be two hundred shares of railroad stock, but which had been fraudulently altered by him from two shares, for which the certificate was in fact originally given. Afterward, upon the payment by C. to the bank, he received his memorandum of indebtedness, and the cashier of the bank, for the purpose of restoring the collateral to C., returned to him the fraudulent certificate with the usual printed form of transfer on the back signed by the cashier. About two weeks after the surrender by the bank of this certificate to C., M. loaned him twenty-five thousand dollars on call with interest, and received from him in good faith the fraudulent certificate, supposing it to be genuine, the signature of the cashier being well

¹ Cleveland, etc., R.R. Co. v. Robins, 35 Ohio St. 483. See Strange v. Houston, etc., R.R. Co., 53 Texas, 162; Bank v. Lanier, 11 Wall. 369; Holbrook v. N. J. Zinc Co., 57 N. Y. 616; Cushman v. Thayer Manuf. Co., 76 Id. 365; Brisbane v. Del., Lackawanna, etc., R.R. Co., 25 Hun, 438; 94 N. Y. 204; Factors', etc., Ins. Co. v. Marine, etc., Co., 31 La. Ann. 149; Moores v. Citizens' Nat. Bank, 111 U. S. 156.

known to M. A day or two after the money was loaned, the fraud first became known to M. and the bank, and he thereupon notified the bank that he should hold it responsible. It was held that the bank, by signing the blank transfer, so far warranted the genuineness of the certificate, that it was estopped from setting up the forgery as a defense to an action brought by M. against the bank to recover the amount of his loss.¹

The transfer agent of a corporation in allowing transfers acts within the scope of his official power, and his knowledge and fraud (if there be fraud) is the knowledge and fraud of the corporation.² Where shares of stock in a corporation were confiscated during the American Rebellion by the Confederate government, and sold to *bona fide* purchasers, it was held that the confiscation and sale being illegal and void, the original owner was entitled to have the outstanding certificates delivered up and cancelled.³ Al-

¹ Mathews v. Mass. National Bank, Holmes C. C. 396. See Strange v. Houston, etc., R.R. Co., 53 Texas, 162.

² Bridgeport Bank v. N. Y. & N. H. R.R. Co., 30 Conn. 231.

³ Dewing v. Perdicaries, 96 U. S. 193. In this case, it appeared that, at the beginning of the American civil war, the Charleston Gas Light Company was a corporation in South Carolina, and that a part of the stock of the company was held by citizens of other States; that, pursuant to a law of the Confederate States, and an order of the Confederate District Court for the District of South Carolina, a number of the shares of the company were sequestered and sold at public auction for the alleged reason that they belonged to "alien enemies." Of this stock the complainant owned several hundred shares, and the defendants were purchasers at the sale, or the assignees of purchasers. The Confederate authori-

ties required the company to erase from its stock-book the names of the loyal owners, to insert those of the purchasers, and to issue stock certificates to the latter, the company acting under duress. The complainant prayed that the sale might be vacated, that the outstanding certificates issued to the purchasers and their assignees might be declared invalid, and ordered to be delivered up and cancelled; that the claimants might be enjoined from transferring or selling the shares, and from bringing suits to effect such transfers, or for dividends; and that the company might be enjoined from allowing such transfers, from issuing new certificates, and from paying dividends on the shares of those parties. It was held that the order of sequestration, the sale, the transfer, and the new certificates, were all void; that the suit was well brought by the complainant, and that the purchasers or their assignees

though a corporation is bound to proper vigilance and care that its stockholders be not injured by unauthorized transfers of their stock, yet where one of two innocent parties is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act. Where, therefore, the owner of stock placed the certificates with the blank powers in the hands of an agent who fraudulently transferred them to an innocent third party, it was held that the corporation was not liable for the loss.¹ A suit was brought by a bank to make the president and directors of an expired corporation responsible for alleged negligence in the settlement of the affairs of the corporation and the distribution of its assets, on the ground that the complainant was the holder of an outstanding certificate of stock under an assignment, but without a transfer on the books, or notice to the corporation or to the defendants that the complainant held the stock. The defendants acted officially as trustees of the expired corporation to settle its affairs under the powers conferred by law, and in doing so made their distribution according to the record of the corporation which exhibited the membership. It was held that as the loss of the bank was attributable to its own negligence, the defendants were not liable.² B. L. & Co. loaned to M., agent of the firm of D. & Q., one thousand dollars, to be returned in thirty days, and took M.'s note therefor, and, as collateral security, two hundred shares of the capital stock of the Howard Fire Insurance Company which in fact belonged to D., whose name had been forged to the assignments of the certificates. These certificates were sent to the insurance company with a request that they should be cancelled, others be issued in lieu thereof to

had no right to indemnity as against the company. See Keppel v. Petersburg R.R. Co., Chase's Decisions, 167.

¹ Pennsylvania R.R. Co.'s Appeal, 86

Pa. St. 80. See Machinists' Nat. Bank v. Field, 126 Mass. 345.

² Bank of Commerce's Appeal, 73 Pa.

St. 59.

B. L. & Co., and the stock be transferred to them, which was done. About a month afterward D. & Q. failed, and notice was given to the insurance company and to B. L. & Co. that D.'s name on the certificates was a forgery. D.'s assignee in bankruptcy filed a bill against the insurance company and B. L. & Co. to compel the latter to deliver up the certificates issued to them, and the company to issue new ones to the complainant. It was held that the insurance company having issued the stock upon the forged name to B. L. & Co., who had before treated it as genuine, and to that extent misled the insurance company, B. L. & Co. could not hold the company accountable for the loss incurred by their own error, unless they could make it appear that they might have avoided the loss except for the negligence or oversight of the insurance company, and that any negligence on the part of the latter would not render it answerable, unless that was the proximate cause of the loss.¹

If the transfer is made by an executor as such, it is notice that there is a will, and in those States where a will of real or personal property is required to be recorded, the corporation is required to take notice of the will, and is chargeable to the same extent as if it had actually read the will; and the corporation will be liable to a *cestui que trust* whose stock is, by means of the transfer, converted by the executor to his own use.² When a corporation whose stock is required to be transferred on its books, permits a transfer to be made by an executor, trustee, or guardian of stock held by him in a fiduciary capacity, for purposes other than such trust, of which the corporation has knowledge, it will be deemed in equity a constructive trustee of the stock thus wrongfully conveyed, and be compelled to

¹ Brown v. Howard Fire Ins. Co., 42 Md. 384. See Hambleton v. Central Ohio R.R. Co., 44 Md. 551.

² Lowry v. Commercial, etc., Bank, Taney's Decis. 310. See Weyer v. Second Nat. Bank, 57 Ind. 198.

make it good.¹ A trustee under a marriage settlement invested a portion of the trust funds in the stock of a manufacturing corporation, and afterward committed a breach of trust by transferring the certificates to various persons by transfers absolute in form, but in fact as collateral security for his own debts. The certificates thus assigned were surrendered to the corporation, and new ones issued by it to the assignees. The trustee having died, and, under a power contained in the instrument, another been appointed in his place, it was held, on a bill in equity filed by the latter, that the corporation was liable on the ground that it had notice that the original holder of the stock was a trustee, and of the name of his *cestui que trust*, and had issued the new certificates without making any inquiry whether his trust authorized him to make a transfer.² So where a cer-

¹ Perry on Trusts, sec. 242; Stewart v. Firemen's Ins. Co., 53 Md. 564. In the absence of fraud or collusion on the part of the corporation, the mere transfer of stock on the books to the purchaser of it, by direction of the administrator, will not render the corporation liable as a guarantor or warrantor of the vendor's title to the stock. The purchaser of the stock must look to him from whom he purchased it. Nutting v. Thomason, 46 Ga. 34; Central R.R., etc., Co. v. Ward, 37 Id. 515.

² Loring v. Salisbury Mills, 125 Mass. 138. In equity, the corporation is bound to protect the title of a *cestui que trust* under a trust of its stock declared upon its books, against the exercise of powers forbidden by, or inconsistent with, the nature and terms of the trust. "The declaration upon its books carries at the same time the force of notice of the trust, and of an acceptance of a certain undefined responsibility connected with it. To define that responsibility, recourse must

be had to the nature of the legal duties incident to its relation to its stockholders. The legal duty of the corporation to assure the title of its stockholder is molded to conform to the state of relations between the trustee of stock and the *cestui que trust*. The corporation is not simply the custodian of the technical title of the stockholder, but of the subsistence of what the stock represents for the purpose of beneficial enjoyment by the stockholder. As the duty of the corporation is commensurate with the right of the stockholder to the full beneficial enjoyment of that which is represented by the stock, it would follow that where the legal title and the beneficial right to the stock are in different persons, the duty of the corporation would extend to the protection of both. The legal duty of the corporation having thus become molded to conform to the state of relations between the parties to a trust of stock, it is manifest that the corporation is to be regarded as so far a privy to the trust that any act on its

tificate of stock is issued to a guardian in his official capacity, and it is expressed on the face of the certificate that he holds it as guardian of certain minors named, the certificate is notice to the corporation, and to one who would be a purchaser; and if it is assigned wrongfully, the duly appointed successor of the guardian will be entitled to have the shares transferred to him, though he cannot present the original certificates to be cancelled.¹ But a person who receives stock in good faith, for a valuable consideration, and without notice of a trust, acquires a good title to the stock, though it may have previously been transferred by a trustee in fraud of his trust. The purchaser is not bound to examine the books of the corporation in search of the validity of former assignments.²

On a bill in equity brought by a national bank to compel the surrender and cancellation of a certificate of shares which have been fraudulently obtained, it appeared that the certificate, with a forged assignment and power to transfer indorsed upon it, was taken to a broker for sale, who caused it to be sold at auction, the purchaser not seeing it or knowing to whom it had belonged; that the certificate

part tending to defeat the object of the trust, will subject it to proceedings undertaken for the administration of the trust." Magwood v. Railroad Bank, 5 Rich. S.C. 379, per WILLARD, J. When stock standing in the name of trustees is transferred by them, their mere designation as trustees without a specification of the trust, or designation of the *cestui que trust*, could not give the officer charged with the custody of the records of the stock any information as to the object and purposes of the trust, and consequently there would not be such knowledge on the part of the corporation, or neglect of duty on that of its officers, as, in case of a wrongful transfer by the trustees, to make the corporation liable to restore the stock,

or its equivalent in value. Albert v. Savings Bank, 2 Md. 159; Brewster v. Sime, 42 Cal. 139.

¹ Atkinson v. Atkinson, 8 Allen, 15. Previous to the statute of Massachusetts of 1817 which prohibited guardians from selling stock of their ward without a license from a judge of probate, the guardian of a person *non compos mentis* had a general authority to sell such property of his ward, and, though he did so improperly, a *bona fide* purchaser would have a good title. Ellis v. Essex Merrimac Bridge, 2 Pick. 243.

² Salisbury Mills v. Townsend, 109 Mass. 115; Stone v. Hackett, 12 Gray, 227. See Cohen v. Gwynn, 4 Md. Ch. 357; Farmers', etc., Bank v. Wyman, 5 Gill, 336.

being presented by the broker to the bank, a transfer was duly made to the auctioneers and a new certificate issued to them; that they delivered the new certificate to the purchaser properly indorsed with an assignment and power to transfer; and that neither the broker, auctioneers, nor purchaser had any knowledge of the forgery. It was held that the bank was not entitled to relief. The court said that the bank had no right to compel the purchaser, rather than any other stockholder, to give up his certificate, and thereby assume the responsibility of its own illegal act in issuing a greater number of shares than the law authorized; that the auctioneers were equally protected by the certificate issued to them by the bank; and that if the broker, by reason of his having presented to the bank the forged power of attorney upon which the new certificate was issued, was liable to the bank in any form (of which the court gave no opinion), the bank had an adequate remedy against him by an action at law.¹ Parties who have received transfers or certificates of spurious stock from the transfer agent of a corporation without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the corporation. And the holder of certificates of stock valid when they were issued, with an assignment and power, on which he has advanced money, may recover damages against the corporation when such certificates have been rendered of no value by its allowance of transfers on the books without requiring a surrender of the certificates.² Shares of stock which have been transferred by an instrument absolute in its terms, may be redeemed upon parol proof that in reality the transfer was made only as collateral security for a debt.³

¹ Machinists' Nat. Bank v. Field, 126 Mass. 345. See Brown v. Howard Fire Ins. Co., 42 Md. 384. Schuyler, 38 Barb. 534. See Hubbell v. Meigs, 50 N. Y. 480; Douglas v. Merceles, 25 N. J. Eq. 144.

² New York & N. H. R.R. Co. v.

³ Newton v. Fay, 10 Allen, 505.

Hypothecation of stock, accompanied with a transfer on the books of the corporation to a lender, to secure the payment of the loan, is a pledge and not a mortgage. There is nothing in the instrument to work a forfeiture of the right to redeem, or otherwise defeat it, except by a lawful sale under the power expressed in the paper; and an agreement that the lender may sell without notice, does not authorize him to do so without a demand of payment.¹

Where a bill charges that certain shares of stock have been colorably and without consideration transferred for the purpose of fraudulently evading the statute, and thereby affecting an election for directors, an injunction will be granted restraining the transferee from voting.²

§ 222. What passes by transfer of shares.—The legal title to stock held in corporations does not pass until the transfer is completed in the mode pointed out by the laws of the State where such corporation is situated. But the equitable title will pass if the assignment be sufficient to transfer it by the laws of the domicile of the assignor, in the absence of any positive or customary law of the State where the corporation exists to the contrary. Such an assignment binds all persons who have notice of it.³ A provision in the charter of a corporation that no transfer of its stock shall be valid until such transfer is entered on the books of the corporation, relates to the transfer of the legal title, and not of the equitable interest in the stock. "Courts of law, as well as courts of equity, are constantly, in all States where the common law prevails, in the habit of hold-

¹ Wilson v. Little, 2 Comst. 443. See Wheelock v. Kost, 77 Ill. 296; Taessig v. Hart, 58 N. Y. 425; Goss v. Hampton, 16 Nevada, 185; Wood v. Hayes, 15 Gray, 375; Fay v. Gray, 124 Mass. 500; Talty v. Freedman's, etc., Co., 93 U. S. 321; Work v. Bennett, 70 Pa. St. 484; Bank v. Treholm, 12 Heiskell, 520.

² Webb v. Ridgely, 38 Md. 364. See Woodruff v. Wentworth, 133 Mass. 309; State v. Smith, 48 Vt. 266; Barnes v. Brown, 80 N. Y. 527; Fisher v. Bush, 35 Hun, 641; Faulds v. Yates, 57 Ill. 416.

³ See Home Stock Ins. Co. v. Sherwood, 72 Mo. 461.

ing a prior assignment of the equitable interest in stock, as superseding the rights of attaching creditors who attach the same with a full knowledge of the assignment."¹ The charter of a bank having provided that all debts actually due and payable to the bank by a stockholder requesting a transfer must be paid before such transfer, unless the president and directors should order to the contrary, it was held that no person could acquire a legal title to shares, except by a regular transfer according to the rules of the bank, and that if any person took an equitable assignment it must be subject to the rights of the bank under the act of incorporation, of which he was bound to take notice.² The general railroad law of Pennsylvania of 1849 enacted that no certificate should be transferred so long as the holder was in-

¹ Black v. Zacharie, 3 How. 483, per STORY, J. See Weyer v. Second Nat. Bank, 57 Ind. 198; State v. Pettenelli, 10 Nevada, 141; Stebbins v. Phoenix Ins. Co., 3 Paige Ch. 350; Balt., etc., R.R. Co. v. Sewell, 35 Md. 252; Hunterdon Bank v. Nassau Bank, 17 N. J. Eq. 496; Farmers', etc., Bank v. Wasson, 48 Iowa, 336; Scripture v. Frankestown Soap Stone Co., 50 N. H. 571; Boston Music Hall Assoc. v. Cory, 129 Mass. 435; Mechanics' Bank v. New York, etc., R.R. Co., 13 N. Y. 599; New York & N. H. R.R. Co. v. Schuyler, 34 Id. 30; Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308; Geyer v. Western Ins. Co., 3 Pittsburgh, 41; Bank of Commerce's Appeal, 73 Pa. St. 59; Newberry v. Detroit, etc., Iron Co., 17 Mich. 141; Brown v. Adams, 5 Biss. 181. Where the act incorporating a company provided that no transfer of any share in the company should be permitted or be valid until the whole capital stock was paid in, it was held that a transfer of the equitable interest in shares, made by a debtor to his creditor to secure a debt, was not in-

tended to be affected. Quiner v. Marblehead Ins. Co., 10 Mass. 476.

² Union Bank v. Laird, 2 Wheat. 390. The charter of a banking corporation provided that the stock should be transferable according to such rules as might be established by the directors; but it did not appear that the directors had established any such rules, except what might be implied from a certificate issued to A. certifying that he had standing to his credit on the books of the corporation ten shares of the capital stock "transferable at the bank in person or by attorney." It was held that the words "transferable at the bank" did not refer merely to the place, but to an act to be done and to assume a formal and authentic shape under the official cognizance of the officers of the institution, and that the shares were liable to attachment in the hands of the bank as the stock of A., although, prior to the attachment, he had assigned and transferred the certificate to B., no application having been made or notice given to the bank of such transfer. Williams v. Mechanics' Bank, 5 Blatchf. 59.

debted to the corporation, except with the consent of the board of directors; and that no transfer of stock should discharge any liabilities or penalties theretofore incurred by the owner. It was held that this applied to all liabilities, though the debt was not due; that a transfer without the consent of the board might be good for some purposes as between the parties, but that it would pass no title; that the consent of the board was in itself the originating act in the change of title, and did not merely operate to perfect the conveyance previously begun; that where the assent of the board was required by a by-law only, the execution of the by-law might be modified by the practice of the corporation, but that where the act of incorporation granted a power, the mode prescribed by the statute for its exercise must be strictly pursued; that an original subscriber was not released from his contract by a transfer of his stock, even though such transfer was with the consent of the board of directors; and that the clause in the act subjecting the assignee of the stock to the disadvantages and liabilities of a member of the corporation was intended to fix the assignee's liability, and not to release that of the assignor.¹ Under the statute of Massachusetts of 1808, which declared that any share of stock in a manufacturing company might be alienated by a deed under the seller's hand and seal, recorded by the clerk of the corporation, it was held that the omission of such recording did not affect the validity of the deed as between the vendor and vendee, but that the transfer was so far effectual as to render the vendee liable for the debts of the corporation under the statute.² Letters of administration are sufficient evidence

¹ Pittsburg, etc., R.R. Co. v. Clark, 29 Pa. St. 146; Reese v. Bank of Montgomery County, 31 Id. 78.

² Eames v. Wheeler, 19 Pick. 442. See Parrot v. Byers, 40 Cal. 614. The word "merchandise" in the statute of frauds, includes shares in a corpora-

tion, and a contract for the sale of them, in the absence of the other requisites, must be proved by some note or memorandum in writing. Tisdale v. Harris, 20 Pick. 9; Fine v. Hornsby, 2 Mo. App. 61.

of authority to transfer, and a trustee of an insolvent debtor stands on the same footing, as also in general an executor, even if the stock has been bequeathed specifically. But the powers of an ordinary trustee are only custody and management, and he has no right to insist upon being allowed to make a transfer of stock which he holds ostensibly in trust, without exhibiting an authority to transfer beyond the certificate.¹

A valid gift of shares in a corporation in view of death may be made by delivering the certificates with the intention of transferring the shares, notwithstanding the certificates contain a restriction as to the manner of transfer. An alleged donor, being the owner of one hundred and twenty shares of bank stock, included in one certificate, made an absolute assignment in writing of twenty shares to his granddaughter, and appointed her his attorney irrevocable to sell and transfer the same to her use. After retaining this paper in his possession for a while, he handed it to his wife, to be put in a tin box with his will and other papers. He was at this time about eighty years of age, and in failing health, and so continued until his death, a few months afterward. It was urged that the gift was not completed, the stock not having been transferred on the books of the bank. It was held, however, that the gift was valid; that the donor by the assignment and power parted with all his interest in the stock assigned as between him and the donee, and the latter became the equitable owner of it

¹ Bayard v. Farmers', etc., Bank, 52 Pa. St. 232. It was held in an early case in Pennsylvania, that bank stock standing in the name of a wife, whether held by her before marriage, or bequeathed to her during coverture, required the action of the husband during coverture to reduce it to possession, and would not pass by an assignment by the husband which did not explicitly

convey his wife's choses in action; but that such of the shares as were transferred by the husband in trust, and subsequently retransferred to the husband and wife, passed by an assignment of the husband's personal estate. Unpaid dividends would be governed by the same rule. Slaymaker v. Gettysburg Bank, 10 Barr. 373.

as against every one but a *bona fide* purchaser without notice; and that the representatives of the donor were trustees for the donee by operation of law to make the gift effectual.¹ Where a testatrix, during her last illness, handed her husband a tin box containing certificates of bank and railroad stock and coupon government bonds belonging to her, telling him what the box contained, and that the contents would be of use to him after her death, it was held a valid gift *donatio causa mortis*, notwithstanding no transfer of the stock, and no power of attorney authorizing such transfer, was signed by the testatrix.²

In a suit to compel a corporation to transfer upon its books to the plaintiff certain shares of stock, and to issue a new certificate to her, it appeared that the husband of the plaintiff, who was the holder of the original certificate, executed in blank the usual assignment and power of attorney upon the back of the certificate, and presented it to the plaintiff; and that some time afterward he assigned the same stock to B. for a valuable consideration, and caused it to be transferred to B. on the books of the corporation. B. was a witness to the original assignment to the plaintiff, was an officer of the corporation, and took the transfer to himself with full knowledge of the plaintiff's claim. It was held that the fact that the stock was a gift to the plaintiff, did not impair or affect the validity of the assignment of it to her, which passed the entire legal and equitable title of the stock, subject to such liens or claims as the corporation might have upon it.³

§ 223. Transfer of shares upon the books.—It has been

¹ Grymes v. Howe, 49 N. Y. 17.

88 N. Y. 520; Francis v. N. Y., etc.,

² Walsh v. Sexton, 55 Barb. 251. See Allerton v. Lang, 10 Bosw. 362; Westerloo v. De Witt, 36 N. Y. 340.

R.R. Co., 17 Abb. Pr. N. C. 1; De Caumont v. Bogert, 36 Hun, 382; Roberts' Appeal, 85 Pa. St. 84; Deming v. Williams, 26 Conn. 226; Reed v.

³ Cushman v. Thayer Manf. Co., 76 N. Y. 365, aff'd S. C. 7 Daly, 330. See Jackson v. Twenty-third St. R.R. Co.,

Copeland, 50 Id. 472.

held that where the statute expressly enacts that stock "may be transferred on the books of the corporation to be kept for that purpose, and not otherwise," no right of property can be acquired to stock without such a transfer.¹ In Connecticut, a similar provision in either the charter or by-laws has been strictly construed, and deemed to render a transfer not in accordance with it invalid for any purpose, the object of such a clause being, according to the Supreme Court of that State, "to render the purchase of the stock secure to any person, if, at the moment of his purchase, the company's books did not furnish evidence that it had been previously transferred."² Where a corporation passed a by-law that no transfer of any share should be valid until received for record by the clerk, who should enter on the transfer the time he received it, which should bear date accordingly, it was held that the change of title took place when the instrument of transfer was received for record by the clerk, and that a sale or assignment, accompanied by a power of attorney, was not alone sufficient.³ In another case, a by-law provided that no assignment or transfer should be valid unless made in the form prescribed by the directors and registered by the clerk of the corporation. It was held that until the actual registration of an assignment, nothing had effectually been done to convey the property; that an assignment in writing, on which the clerk entered

¹ Coleman v. Spencer, 5 Blackf. 197. See Brown v. Adams, 5 Bissell, 181. The books and papers of a corporation, though of necessity left in some one hand, are the common property of the stockholders, and unless the charter provides otherwise, a shareholder has a right to inspect them for a definite and proper purpose at reasonable times. Phoenix Iron Co. v. Com., 113 Pa. St. 563.

² Marlborough Manf. Co. v. Smith, 2 Conn. 544.

³ Oxford Turnp. Co. v. Bunnel, 6

Conn. 552. In Colt v. Ives, 31 Conn. 25, this rule is limited to the legal title, an equitable title passing by an unrecorded assignment. See Blanchard v. Dedham Gas Co., 12 Gray, 213; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Weyer v. Second Nat. Bank, 57 Ind. 198; State v. First Nat. Bank, 89 Id. 302; Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308; Otis v. Gardner, 105 Ill. 436; Fraser v. Charleston, 11 S. C. 486; Boatmen's Ins. Co. v. Able, 48 Mo. 136.

"received for record," was not thereby registered or recorded; that nothing short of copying it on the books of the corporation was sufficient.¹ Where a statute respecting assignments by insolvent debtors for the benefit of creditors required the record of such assignment to be made in the probate office, it was held that the mere execution and delivery of such assignment did not transfer the legal title to stock in a corporation so as to supersede the transfer on the books of the corporation in conformity with its by-laws.²

According to the weight of authority, provisions of the charter or by-laws that transfers of shares shall be registered on the books of the corporation are intended exclusively for the benefit of the corporation, the only notice of a transfer which it is bound to regard being a registry on its books; and that, notwithstanding the by-laws provide that all transfers of stock shall be made in a book to be kept by

¹ *Norton v. Newton, etc., Turnp. Co.*, 3 Conn. 544. B., the owner of shares, authorized the secretary of a corporation, by a power of attorney, to transfer his stock. The secretary entered on the books, "Stock transferred. See paper filed." The paper referred to was the power of attorney, which he wafered to the book, and then signed the entry as secretary. It was held that this was a substantial compliance with a by-law which required the transfer to be made on the books of the corporation, and to be attested by the secretary. *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

² *Dutton v. Connecticut Bank*, 13 Conn. 493. In Wisconsin, under Section 1751 of the Revised Statutes, an assignment of shares by the indorsement and delivery of certificates is not valid, except as between the parties, until entered on the books of the corporation. *Application of Murphy*, 51

Wis. 519. It is the same in Maine, under Section 11 of ch. 46 of the Rev. Sts. of that State. *Skowhegan Bank v. Cutler*, 49 Me. 315; *S. P. People's Bank v. Gridley*, 91 Ill. 457. In *Fisher v. Essex Bank*, 5 Gray, 373, approved in *Blanchard v. Dedham Gas Light Co.*, 12 Id. 213, it was held that the shares in a bank whose charter provided that they should be transferable only at its banking house and on its books, could not be effectually transferred as against a creditor of the vendor who attached them without notice of a transfer by a delivery of the certificate together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer had been given to the bank before the attachment. See *Dickinson v. Cent. Nat. Bank*, 129 Mass. 279; *Sibley v. Quinsigamond Nat. Bank*, 133 Id. 515; *Cent. Nat. Bank v. Williston*, 138 Id. 244; Sts. of Mass. of 1884, ch. 229.

the treasurer for that purpose and in a particular form, this is not essential to the passing of the property as between the parties; but the purchaser cannot compel the corporation to pay dividends or insist upon certificates without applying to have a transfer made conformably to the by-laws.¹ "The rules and by-laws of a company which pro-

¹ Sargent v. Essex Marine R.R. Co., 9 Pick. 201; Bank of Utica v. Smalley, 2 Cowen, 770; Gilbert v. Manchester Manf. Co., 11 Wend. 627; Farmers' Bank of Md. v. Iglehart, 6 Gill, 50; Duke v. Cahawba Nav. Co., 10 Ala. 82; Arnold v. Suffolk Bank, 27 Barb. 34; Chouteau Spring Co. v. Harris, 20 Mo. 382; Hall v. Union Ins. Co., 5 Gill, 484; Hodges v. Planters' Bank, 7 Gill & Johns. 366; Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120; Ellison v. Schneider, 25 La. Ann. 435; Brown v. Adams, 5 Biss. 181; Mechanics' Banking Assoc. v. Mariposa Co., 3 Robertson, 395; Grymes v. Hone, 49 N. Y. 17; Johnson v. Underhill, 52 Id. 203; Shellington v. Howland, 53 Id. 371; Smith v. Am. Coal Co., 7 Lansing, 317; Newberry v. Detroit, etc., Manf. Co., 17 Mich. 141; Helm v. Swiggett, 12 Ind. 196; Brown v. Phelps, 103 Mass. 313; Newell v. Williston, 138 Id. 240; Pub. Sts. of Mass., ch. 105, sec. 24; Baldwin v. Canfield, 26 Minn. 43. See Pinkerton v. Manchester, etc., R.R. Co., 42 N. H. 424. In McNeil v. Tenth Nat. Bank, 46 N. Y. 325, RAPALLO, J., said that it had "been settled by repeated adjudications that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation and can

be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections. . . . By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company by the registered holder to a *bona fide* purchaser; but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation for allowing such a transfer in violation of his rights. He also takes the risk of the collection of dividends by his assignor or of any lien the corporation may have on the shares. But in other respects his title is complete. The holder of such a certificate and power possesses all the external *indicia* of title to the stock and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third

hibit any transfer except upon the books of the company and upon notice, have reference either to the right of voting or to the security of the company by way of a lien upon the stock for any indebtedness of the stockholder, and do

parties, but apparently the legal title, and the means of transferring such title in the most effectual manner." "It was not intended to introduce a new mode of acquiring title to stocks, much less to operate as a registry law, by furnishing conclusive evidence to the public of the ownership of the property. If such had been the design, it might have been expected that the legislature would have required that the books of transfer should be at all times open to public inspection, and the record, not in certain specified cases merely, but in all cases, made evidence of ownership. Nor does sound policy require such construction to be given to the act. The pledge of stocks as collateral security has become a prevalent, and to the borrower especially, an advantageous mode of effecting loans. In manufacturing companies especially, where the business of the company is carried on by the stockholder, and where his capital is mainly or exclusively vested in the stock and employed in the active operations of business, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors, will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator, to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of the privilege

of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property? . . . Such a certificate annexed to or accompanying a blank power of attorney we cannot doubt, not only according to the understanding of men in business, but upon well-settled principles of law, passes by delivery an equitable title to a *bona fide* purchaser; nor can such purchaser be justly prevented from converting his equitable into a legal title by filling up and exercising the power whenever he is entitled to do so by the nature and terms of the contract under which the certificates were delivered to him. When the stock is sold absolutely, his right then to perfect his title is immediate; when it is hypothecated, the right accrues when the debt meant to be secured becomes due and remains unpaid." Broadway Bank v. McElrath, 2 Beasley (13 N. J. Eq.), 24, per GREEN, Chancellor. See Rogers v. Stevens, 4 Halst. Ch. 167; Leavitt v. Fisher, 4 Duer, 1; Fatman v. Lobach, 1 Id. 361. It was remarked by the court in a late case in the Supreme Court of the United States that the entry on the books was required, not for the transferring of the title, but for the protection of the parties and others dealing with the corporation, and to enable it to know who were its stockholders entitled to vote at its meetings and to receive dividends when declared; that it was necessary to protect the seller against subsequent liability as a stockholder, and possibly to protect the purchaser against proceedings of the seller's creditors; that

not incapacitate such stockholder from parting with his interest. The purchaser acquires the right of property which the seller had. If the stock is under incumbrance, it remains so; if it cannot be voted upon un-

purchasers and creditors, in the absence of other knowledge, were only bound to look to the corporate books; that, as between the vendor and vendee of shares, it was sufficient that the certificate was delivered with authority to the purchaser, or any one he might name, to transfer it on the books of the corporation, and payment of the price; and that if the corporation refused to issue a new certificate, it might be compelled to do so by either of the parties. Johnson v. Laffin, 103 U. S. 800; S. C. 5 Dillon, 65. See Houston, etc., R.R. Co. v. Van Alstyne, 56 Texas, 439.

Stock in a corporation may be deemed similar to a chose in action, the equitable title of which, as between the parties, may be transferred without observing the requirements of the charter or by-laws of the company. The principle upon which the decisions are based is, that a sale of stock, although not entered upon the books of the company, is valid in equity and transfers the title to the purchaser; that the vendor in whose name the title stands upon the books holds the legal title as trustee, and in the event that the trustee is compelled to pay an assessment, or is liable to be called upon for payment, the *cestui que trust* is bound to repay or indemnify, as the case may require. Kellogg v. Stockwell, 75 Ill. 68. When shares, by the terms of the charter or by-laws, are transferable only on the books of the corporation, a purchaser who receives a certificate with a power of attorney to transfer, gets the entire title, as between himself and his seller, with all of the rights the latter possessed; but as between himself and the corporation he acquires only an equit-

able title which the corporation is bound to recognize and permit to be ripened into a legal title when he presents himself to do the acts required by the charter or by-laws in order to make the transfer. Until those acts are done he has no claim to act as a stockholder. When there is a prescribed form of stock certificate which states that the holder is entitled to the number of shares named and that they are transferable on the books of the corporation at its office, on the surrender of the certificate, it assures to all persons safety in purchasing the certificate; and if the corporation permits a transfer of stock in violation of its undertaking to protect the rights of owners, the law gives them a remedy to the extent of the injury. New York & N. H. R.R. Co. v. Schuyler, 34 N. Y. 30. An attaching creditor is not bound to look beyond the books of a corporation to ascertain whether his debtor has made an assignment of the stock standing in his name. Dutton v. Connecticut Bank, *supra*; Shipman v. Aetna Ins. Co., 29 Conn. 245; Application of Murphy, 51 Wis. 519; Skowhegan Bank v. Cutler, 49 Me. 315; Weston v. Bear River, etc., Mining Co., 5 Cal. 186; Strout v. Natomia, etc., Co., 9 Id. 78; Naglee v. Pacific Wharf Co., 20 Id. 529. See U. S. v. Vaughan, 3 Binney, 394. In Fisher v. Essex Bank, 5 Gray, 373, it was held that shares in a bank whose charter provides that they shall "be transferable only at its banking house and on its books," cannot be effectually transferred as against a creditor of the vendor who attaches them without notice of any transfer, by a delivery of the certificates with an assignment

less transferred twenty days before an election, and the transfer is made ten days previous, then it cannot be represented in that election."¹ The corporation may, of course, waive its right to require transfers to be made on its books. Where a stockholder in a corporation which had no transfer-book transferred his shares without causing the transfer to be made on the corporate books, as directed by the charter, and the certificate of transfer, required to be filed in the town clerk's office, was not signed by the officers of the corporation pursuant to its by-laws, but was recorded by order of the corporation which recognized the transferee as the owner of the shares, it was

and blank power of attorney from the vendor, even if notice of such transfer be given to the bank before the attachment. The express provision of the charter regulating the mode of transfer, was declared to have the force of a general provision of law, binding on the corporation and its stockholders, and on all other persons. But it has been held in the same State, that there must be a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with the known rules of the common law by which the delivery of a stock certificate with a written transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. *Dickinson v. Cent. Nat. Bank*, 129 Mass. 279; *Boston Music Hall Assoc. v. Cory*, Id. 435. See *MERCHANTS' NAT. BANK v. Richards*, 6 Mo. App. 454.

¹ *Gilbert v. Iron Manf. Co.*, 11 Wend. 627; *Bank of Commerce's Appeal*, 73 Pa. St. 59. Under the by-laws of a bank, the stock of every shareholder was pledged to the corporation for any and all moneys which the owner might at any time owe the bank. L., a stock-

holder, got his note discounted by the bank, and afterward failed. The day of his failure he assigned, for a valuable consideration, all his right, title, and interest in his stock to B. and C., and executed a power of attorney on the back of the certificate to B. to enable him to transfer the shares upon the books of the bank. B. presented the certificate and power of attorney at the bank and demanded a transfer, which the cashier refused, claiming that the bank held the shares pledged for the payment of the note. Subsequently other creditors of L. caused an attachment to be sued out against him, attached his shares, and caused them to be sold under the attachment. It was held that the attachment was void. *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454. When a corporation by its charter, or by statute, has the option to prohibit a transfer of shares by stockholders who are indebted to it, no lien is created on the stock until such option is exercised, and consequently no right to retain the stock for the satisfaction of debts due. *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575. See *Bank of America v. McNeil*, 10 Bush. Ky. 54.

held that the transferor was not liable to pay calls after the transfer.¹ So, where the charter of the corporation provided that its stock should be transferable only on its books in such mode as the directors should prescribe, and a by-law was adopted pointing out the form to be observed, which, however, was never used, but a different mode uniformly employed, it was decided that a holder of stock under a transfer so made was entitled to dividends as against the corporation ; but whether his claim to the stock was superior to that of a judgment creditor of his vendor who, after the transfer, had attached and levied on the stock, was not determined.²

¹ Isham v. Buckingham, 49 N.Y. 216; See Robinson v. Nat. Bank, 95 N.Y. 637. When a board of directors is unable to get possession of the old stock-book, it is proper for it to prepare a new one as accurately as it can. But upon the making of a new book the old one does not cease to be a stock-book of the corporation. The inspectors of election may use the new book, but if the old book is produced they will err if they wholly reject it. For a new stock-book is at best but a copy ; though transfers subsequently made in the new book are original. Accordingly, in an action against a corporation at the instance of a stockholder in a defeated faction, a new election was ordered where it was found that the following of the foregoing rule would have led to a different result. Schoharie Valley R.R. Case, 12 Abb. Pr. N. S. 394.

² Richmondville Manf. Co. v. Prall, 9 Conn. 487. See Ellison v. Schneider, 25 La. Ann. 435; Noyes v. Spaulding, 27 Vt. 420; Orr v. Bigelow, 20 Barb. 21; Munn v. Barnum, 24 Id. 283; Walker v. Detroit Transit R.R. Co., 47 Mich. 338. When stock is sold it is the duty of both of the parties to the transaction to see that the shares are properly

transferred. In Webster v. Upton, 91 U. S. 65, which was an action brought by the assignee in bankruptcy of a corporation against Webster, the alleged transferee and holder of stock, to recover from him an unpaid balance remaining thereon, the court said : "The last assignment of anything that can be assigned for error is, that the court charged the jury as follows : 'The only question is, was the defendant a stockholder of the company ? If the testimony satisfies you that the defendant purchased of Hale one hundred shares of this stock, and that it was transferred on the books of the company, either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, the defendant is liable the same as if he had subscribed for the stock.' The objection urged against this is, that a transfer on the books directed by Hale after the purchase by Webster, could not affect the latter's liability. But if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, namely, on the books of the company ; and the purchase was in itself authority to the vendor to make the transfer. Still further, it was Webster's duty to

§ 224. Sale of shares by delivery of certificates.—When a stockholder assigns all his interest in his shares, surrenders his certificate of stock, and executes a power authorizing the vendee to transfer the stock in due form on the books of

have a legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer. If so, it is clear that the vendor may himself request the transfer to be made; and that when it is made at his request, the buyer becomes responsible for future calls. This, however, does not interfere with the right of one who appears to be a stockholder on the books of the company to show that his name appears on the books without right, and without his authority,"—per STRONG, J. See *Green Mt., etc., T. Co. v. Bulla*, 45 Ind. 1.

In the United States "the question of transferring stock upon the books of the company has not received the attention which it has in England, because in the latter country, where most commercial corporations are organized by the payment of only a limited amount of the fixed capital, calls can be, and are generally, made upon the stockholders of record, and if the registration of the shares is not attended to, the shareholder of record may be compelled to pay the same, although he may have long since parted with his stock. The rule is the same in this respect in the United States. But with us corporations have either paid up their capital in cash, or its equivalent, pursuant to statutory enactment, and the stockholders are not generally liable for future calls. But the increasing number of corporations, and the frequent evasions of the requirements of the statutes authorizing the issuance of the entire capital for property, by plac-

ing a fraudulently extravagant value thereon, may, and doubtless will, render the question of calls or assessments, and the necessity of seeing that a transfer or registration is made upon the books of the company when a sale is made, as important and essential as it is in England." *Dos Passos on Stock Brokers and Stock Exchanges*, 155.

When a person purchases stock for another and takes a transfer on the books of the corporation in his own name it is sufficient if he afterward transfers to his principal the same number of shares, though they be not the identical ones purchased by him. *Nourse v. Prime*, 4 Johns. Ch. 490; 7 Id. 69; *Gilpin v. Howell*, 5 Barr. 41; *Salters v. Genin*, 3 Bosw. 250; 7 Abb. Pr. 193. The same is true of government bonds purchased for another. *Chamberlin v. Greenleaf*, 4 Abb. N. C. 178; *Lawrence v. Maxwell*, 58 Barb. 511; *Marston v. Gould*, 69 N. Y. 220; *Rogers v. Gould*, 6 Hun, 229; *Boylan v. Hoguet*, 8 Nevada, 345. But the agent must be able and ready to deliver an equal number of similar shares upon payment by the principal of the amount due thereon, and if he deprives himself of the power, the principal may recover the value of the shares on the day the sale was made. *Langton v. Waite*, L. R. 6, Eq. 165. On this question the court, in *Taussig v. Hart*, 58 N. Y. 425, said: "To allow a broker to sell his customer's stock without authority, and speculate upon it, replacing it at a lower price, would be encouraging speculations by agents at the risk of their principals, and is totally inadmissible under familiar rules.

the corporation, the title vests in the person to whom the stock is transferred. The object of having the transfer recorded on the corporate books being notice, the transfer, though not recorded, is good against all who have notice in fact of the transfer; and the tender of a certificate with the power attached, is a sufficient compliance with a contract to deliver the shares.¹ The certificate has a blank

Should the stock rise largely in price after the broker had thus divested himself of all control over the shares which he had purchased on the order of his principal, the broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the broker. This clearly is not what is contemplated under an agreement to buy and carry stocks. The customer does not rely upon an engagement of the broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, subject only to the payment of the purchase price."

¹ *Bank v. Lanier*, 11 Wall. 369. In this case, DAVIS, J., in delivering the opinion of the court, said: "The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the con-

fidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates regularly assigned with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

With reference to the non-negotiability of stock certificates, COMSTOCK, J., in delivering the opinion of the court in *Mechanics' Bank v. New York & N. H. R.R. Co.*, 13 N. Y. (3 Kernan) 599, said: "Looking at the ques-

assignment and power of attorney indorsed upon it, which the person in whose name the shares stand on the books signs and seals. The certificate thus indorsed may be passed from hand to hand, the last holder being entitled to insert his name in the assignment, and have the shares transferred to him on the books.¹ It has been held that a seal

tion upon principle, I am not aware of anything in the nature or uses of this kind of property which requires an application of the rules which belong to negotiable securities. Stocks are not like bank bills, the immediate representative of money, and intended for circulation. The distinction between a bank bill and a share of bank stock is not difficult to appreciate. Nor are they like notes or bills of exchange, less adapted to circulation, but invented to supply the exigencies of commerce, and governed by the peculiar code of commercial law. They are not like exchequer bills and government securities, which are made negotiable either for circulation or to find a market. Nor are they like corporation bonds, which are issued in negotiable form for sale, and as a means of raising money for corporate uses. The distinction between all these and corporation stock is marked and striking. They are all in some form the representative of money, and may be satisfied by payment in money at a time specified. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member. The primary use and design of this species of property is to afford a steady investment for capital, rather than to feed the spirit of speculation." See Shaw v. Spencer, 100 Mass. 382. "The rights of a *bona fide* holder as against

the true owner of the stock, to whom the apparent holder has either sold or pledged it, do not depend on the negotiable character of the certificates, but rest on a different principle, viz., that one who has conferred upon another, by a written transfer, all the *indicia* of ownership of property, is estopped to assert title to it as against a third person who has in good faith purchased it for value from the apparent owner." Dos Passos on Stock Brokers and Stock Exchanges, 601. See Weaver v. Bardeen, 49 N. Y. 286; Campbell v. Morgan, 4 Ill. App. 100; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600.

¹ Kortright v. Buffalo Bank, 20 Wend. 91; 22 Id. 348; Building Assoc. v. Sendmeyer, 50 Pa. St. 67; Day v. Holmes, 103 Mass. 306. This practice was condemned in one case in Pennsylvania, though it is now the law in that State. In Denny v. Lyon, 38 Pa. St. (2 Wright) 98, the court said: "The cashier of the bank swears that the name of the transferee is usually not inserted in the power of attorney, and that it is more convenient not to have it inserted. We know that this is commercial usage; it was probably originated by the banks: if not, they have countenanced it, and thus brought people to practice it, and yet it is a vicious usage, which no considerations of convenience are sufficient to justify." On the other hand, in a case in Connecticut, the following language was employed with reference to blank powers: "No reason can be assigned which is founded in good sense, and is not en-

is not essential to the validity of an assignment of shares.¹ A tender of a stock certificate, with a power of attorney to transfer, is a sufficient tender without an actual transfer of the stock to the name of the purchaser.² Such a power of attorney is a power coupled with an interest, and cannot be revoked by death or otherwise.³ The purchaser whose name is written into the transfer of a stock certificate, derives his title immediately and solely from the stockholder of record, and the insertion of the word "trustee" after the name of the stockholder gives notice of a trust.⁴ A voluntary gift of shares to a trustee in trust, when fully completed and executed, is valid against all persons except creditors and *bona fide* purchasers without notice; and, as between the parties, the delivery of the stock certificate with an assignment and power of attorney to transfer, vests

tirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view derived from the ancient law of England, can justify the making of any distinction between them. Such a distinction is little suited to the usages and necessities of modern commerce, for credit among merchants, and facilities for making it available in their transactions, are a most important element in its character, however unimportant they may have been in a state of society where commerce was little known, where seals were a substitute for signatures, and where lords and vassals alike could not write their own names." Bridgeport Bank v. New York & N. H. R.R. Co., 30 Conn. 274. See Holbrook v. N. J. Zinc Co., 57 N. Y. 661; Winter v. Belmont Mining Co.,

53 Cal. 48; First Nat. Bank v. Gifford, 47 Iowa, 575; Johnson v. Laflin, 5 Dillon, 65; Webster v. Upton, 91 U. S. 65; McNeil v. Tenth Nat. Bank, 46 N. Y. 324.

¹ Atkinson v. Atkinson, 8 Allen, 15.

² An agreement to assign and transfer to a person by a proper instrument of conveyance certain stock, or the interest a party may have acquired therein, is performed by executing and tendering to the person an assignment of the stock with a power of attorney to transfer the same on the corporate books, notwithstanding the corporation refuses to make the transfer. It is no part of such an engagement that the assignor shall procure a transfer of the stock upon the books, and the assignee is bound to accept it when tendered, and to pay for it according to the terms of the contract. Orr v. Bigelow, 20 Barb. 21.

³ Munn v. Barnum, 24 Barb. 283; Fraser v. Charleston, 11 S. C. 486.

⁴ Shaw v. Spencer, 100 Mass. 382.

the title in the trustee, though the transfer is not recorded on the books of the corporation.¹ The mere assignment of a certificate of stock, with a power of attorney to transfer, is not an effectual transfer as against an attachment on mesne process made before notice given and demand made for a transfer under the power.² S. being the owner of certain shares of the capital stock of an insurance company, assigned to B. the certificates of the stock, together with a power of attorney authorizing the assignee to cause the proper transfer of the stock to be made on the books of the company. The assignment was made as collateral security for the payment of S.'s note to B. for five hundred dollars with interest. B. neglected to have the stock transferred on the books of the company, and W., having no knowledge of the assignment, brought an action against S. to recover a considerable sum of money due him from S., and an attachment was levied on the stock standing in S.'s name on the books of the company. Subsequently, W. recovered judgment, and issued execution, when B. brought a suit to enjoin the sale. It appeared that the value of the stock exceeded the amount of the indebtedness of S. to B. It was held that S. retained an interest in the stock which was subject to sale, and that a purchaser at the execution sale without notice of the previous assignment to B. would take the stock discharged of B.'s lien.³ An in-

¹ Stone v. Hackett, 12 Gray, 227. Where one member of a general partnership subscribes for stock in the name of the firm, and pays for it out of the means of the firm, it is competent for him to transfer such stock by indorsing an assignment on the certificate; and a delivery of the certificate with the indorsement on it to a purchaser for a valuable consideration, is a sufficient transfer of the interest of the firm in the stock. Quiner v. Marblehead Ins. Co., 10 Mass. 476.

² Fisher v. Essex Bank, 5 Gray, 373; Boyd v. Rockport Steam Cotton Mills, 7 Id. 406; Blanchard v. Dedham Gas Light Co., 12 Id. 213; Young v. South Tredegar Iron Co., 2 South Western Reporter, 202.

³ Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600. See Naglee v. Pacific Wharf. Co., 20 Cal. 529; Broadway Bank v. McElrath, 13 N. J. Eq. (2 Beas.) 24; Fraser v. Charleston, 11 S. C. 486; Smith v. Crescent City, etc., Co., 30 La. Ann. 1378. Where shares

surance policy on a life being a *chose in action*, an assignment for a valuable consideration for a part of the amount of the policy indorsed thereon, and notice given to the insurance company, but the policy retained by the assignor, does not transfer to the assignee such an interest as will enable him, if the estate of the assignor is insolvent, to recover the amount from the administrator, but only to take *pro rata* with the other creditors.¹

§ 225. Effect of transfer on the rights of the parties to it.—Upon the sale and transfer of stock by proper authority, when *bona fide*, and not affected by any secret trust, the transferor ceases to be a shareholder, and the purchaser is invested with the title to the stock with all its incidents.² A transfer of shares on the books of a corporation for value to a *bona fide* holder, passes to him the shares so trans-

of stock were transferred and new certificates issued to a person presenting a *prima facie* title several weeks before the same shares were sold under attachment, it was held that a mandamus would not be awarded commanding the corporation to transfer the shares to the purchaser at the attachment sale, although there was a doubt whether the previous transfer was not made to defraud creditors. *State v. Warren Foundry, etc., Co.*, 32 N. J. 439.

¹ *Palmer v. Merrill*, 6 CUSH. 282. *SHAW*, C. J.: "The transfer of a *chose in action* bears an analogy, in some respects, to the transfer of personal property. There can be no manual extradition of a *chose in action*, as there must be of personal property to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power

over it on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in the place of the assignor as the owner." In the foregoing case, a new trial was granted on additional facts showing that the assignment was delivered to the assignee at the time, on which he obtained a verdict.

² *State v. Smith*, 48 Vt. 266; *Farmers', etc., Bank v. Champlain, etc., Co.*, 18 Id. 131; *Hamilton, etc., R. R. Co. v. Rice*, 7 Barb. 157; *Johnson v. Laflin*, 5 Dillon, 65; *Shellington v. Howland*, 53 N. Y. 372. The purchaser of stock who surrenders his certificate, and has one issued to him, and his name entered on the books of the corporation, becomes subrogated to the rights, and assumes the liability of an original subscriber. *Huddersfield Canal Co. v. Buckley*, 7 Term R. 36; *Hartford R.R. Co. v. Boorman*, 12 Conn. 530; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Seymour v. Sturgis*, 26 N. Y. 134; *Upton v. Hansbrough*, 3 Biss. 417; *Agricultural Bank v. Burr*, 24 Me. 256.

ferred, although the transferor does not at the time surrender his certificate; and a by-law of the corporation which requires a surrender of the certificate before making a transfer, is not binding on third parties. The fact that the owner had pledged his certificate to a third person as security for money borrowed, without notice to the corporation of his having done so, would not affect such transfer, or the title of the transferee. But a transfer by a person who at the time has no shares on the books of the corporation, conveys no title to stock subsequently acquired. Stock received and transferred on the same day, should in equity be considered as received before it was transferred, unless the contrary is shown. A power of attorney attached to a certificate which contains an assignment of shares and authority to transfer them, does not authorize the transfer of shares acquired after the date of the power. A certificate and power of attorney held by a party to whom it is pledged without a transfer on the books of the corporation, entitles him to any stock of the person named therein at the date of the power if he continues to hold such stock.¹ The owner of stock, who has passed the legal title with an unlimited power of disposition, cannot set up an unknown equity against a title acquired thereunder in good faith for a valuable consideration. Although the delivery of a chattel or chose to another in pledge is insufficient to preclude the real owner from asserting his rights in case of an unauthorized disposition of it by the pledgee, yet if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto, and of unconditional power of disposition over it, he is estopped to dispute the title which he has apparently conferred.² C. having borrowed money

¹ N. Y., etc., R.R. Co. v. Schuyler, 38 Barb. 534. Y. 325; Cushman v. Thayer Manf. Co., 76 Id. 365; Prall v. Tilt, 28 N. J. Eq.

² McNeil v. Tenth Nat. Bank, 46 N. 479.

from a bank, desposited with the bank as collateral security a certificate of certain shares of the capital stock of a corporation, with a blank power of attorney on the certificate to transfer the stock on the books of the corporation. The bank pledged the certificate to F. to secure money borrowed from him by the bank, F. being ignorant of C.'s rights, and fully believing that the stock was the property of the bank. At the time the bank borrowed the money from F. and assigned the certificate to him, no transfer had been made on the books of the corporation. It was held that, as between C. and F., the latter had the better equity, and was entitled to hold the stock for the satisfaction of his claim against the bank.¹

¹Cherry v. Frost, 7 Lea Tenn. 1. See Weston v. Bear River, etc., Co., 6 Cal. 425; Lowry v. Commercial, etc., Bank, Taney's Decis. 310; Shaw v. Spencer, 100 Mass. 389; Duncan v. Jandon, 15 Wall. 165; Scholfield v. Union Bank, 2 Cranch, 115; Vowell v. Thompson, 3 Id. 428; Willcocks, *ex parte*, 7 Cowen, 402; Lawrence v. Maxwell, 53 N. Y. 19; McHenry v. Jewett, 26 Hun, 453. In an action by a railroad company against certain persons, it appeared that one P., owning five shares of the stock of the company for which she held a certificate, her son forged her name to a blank power of attorney printed upon the back of the certificate, and delivered it to a broker who sold the shares to the defendants and delivered to them the certificate with the forged signature on it; that the defendants having presented it to the transfer clerk of the company the shares were transferred upon the books and a new certificate issued to the defendants; and that afterward, before the discovery of the forgery, the defendants sold the stock, and at their request the corporation issued a new certificate to the purchaser. As P. never parted with her property in the shares, the company was obliged to procure five shares of its corporate stock and issue a certificate to her, and also to pay her the dividends upon the five shares. The company had no remedy against the person who purchased of the defendants, because as to him it was estopped to deny its certificate issued to the defendants and transferred to the purchaser. The court, per MORTON, C. J., said: "The defendants have been cheated, but they have not lost their money by any act of the plaintiff. They lost it because they failed to make the inquiries necessary to detect the forgery. They have a remedy over against the person who sold the stock to them; but the plaintiff has no remedy except against the defendants. We are of opinion that in law and upon the equities of the case the plaintiff is entitled to recover, and that it can maintain this action." Boston & Albany R.R. Co. v. Richardson, 135 Mass. 473. See Simm v. Anglo Am. Tel., 5 Q. B. D. 188; Hambleton v. Cent. Ohio R.R. Co., 44 Md. 551; Brown v. Howard Ins. Co., 42 Id. 384. With reference to spurious stock fraudu-

When the holder and owner of a certificate of withdrawn stock assigns the same in good faith, and for a valuable consideration, the assignee acquires thereby a good title, subject only to such liens as may be upon it at that time. No transaction had between the assignor and the corporation subsequent to such assignment, and not made with specific reference to the certificate, would give the corporation a lien thereon, though it had no notice of such transfer. A bank, by authority of the legislature, reduced its stock one-half. C. was the owner of twenty shares of the par value of \$2,000. In March, 1860, he surrendered his old scrip, and took new scrip for one-half thereof. One thousand dollars being the par value of the other half, the bank placed that amount to his credit on its books, and issued to him a certificate therefor. Subsequently C. transferred the certificate in good faith, and for a valuable consideration. At this time the bank had no lien of any kind upon it. It was held that the discounting of a note by the bank for the assignor, gave the bank no legal or equitable claim upon the assigned certificate or right to appropriate it to the payment of the loan, and that the bank was bound to make payment to the party owning the certificate.¹

§ 226. Liability of transferee of shares.—In general, after the transfer of shares, the transferee holds them upon the same conditions, and subject to the same rules and orders as the original subscriber in whose place he is substituted, being, when he has come into privity with the corporation by having the stock transferred to him on the books, equally liable as if he were the original holder, to pay subsequent

lently issued by the agent of a bank and transferred from time to time to innocent purchasers, it was held that as against *bona fide* holders of such stock, the bank would be estopped from going beyond its last certificate in any question between the bank and such holder touching the obligatory

force of such certificate on the corporation. *Bank of Ky. v. Schuylkill Bank*, 1 Pans. Sel. Cas. 180. See *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Fisher v. Essex Bank*, 5 Gratt. 373; *Dé Voss v. City of Richmond*, 18 Id. 338.

¹ *Callanan v. Edwards*, 32 N. Y. 483.

instalments, and also in relation to the contracts and engagements of the corporation.¹ "The principal difficulty in regard to the liability for calls arises where there have been transfers, and the name of the transferee not entered upon the books of the company. For whenever the name of the vendee of shares is transferred to the register of shareholders, the cases all agree that the vendor is exonerated (unless there is some express provision of law by which the liability of the original subscriber still continues), and the vendee becomes liable for future calls. The vendee having made such representation to the company as to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer. Where the party had represented himself to the company as the owner of shares, and sent in scrip certificates which had been purchased by him, claiming to be registered as proprietor in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered as required by the act."² An assignee of stock who has caused it to be transferred to himself on the books of the corporation, is liable to it, or to its creditors after it has become bankrupt, though he holds the stock as collateral security for a debt due from his assignor.³

¹ Huddersfield Canal Co. v. Buckley, 7 Term R. 36; Hartford, etc., R.R. Co. v. Boorman, 12 Conn. 530; Bend v. Susquehanna Bridge Co., 6 Har. & Johns. 128; Hall v. U. S. Ins. Co., 5 Gill, 484; Longley v. Little, 26 Me. 162; McLaren v. Franciscus, 43 Mo. 452; Curtis v. Harlow, 12 Metc. 3; Cowles v. Cromwell, 25 Barb. 413; Holyoke Bank v. Burnham, 11 Cush. 183; Magruder v. Colston, 44 Md. 349; Moore v. Jones, 3 Woods, 53; West

Phila. Canal Co. v. Jones, 3 Whart. 198; Merrimac Mining Co. v. Levy, 54 Pa. St. 227; Webster v. Upton, 91 U. S. 65; McCready v. Rumsey, 6 Duer, 574. See Palmer v. Ridge Mining Co., 34 Pa. St. 288; Everhart v. Phila., etc., R.R. Co., 28 Id. 339.

² Bennett's Case, 5 De G. M. & G. 284.

³ Pullman v. Upton, 96 U. S. 328; Adderly v. Storm, 6 Hill, 624; Wheelock v. Kost, 77 Ill. 296.

If in consequence of neglect on the part of the purchaser of shares to procure a transfer of them on the books of the corporation, the seller is made liable for assessments or calls, the purchaser is bound to indemnify him therefor, and for any liability incurred on account of the shares after the sale;¹ and the purchaser or transferee may be compelled in equity to register, to pay calls, and to indemnify the seller for expenditures necessarily made in relation to stock sold.² When there have been intermediate sales without a transfer on the books, specific performance will be decreed at the suit of the original vendor against the ultimate purchaser.³ Where the statute makes the original stockholder individually liable for the debts of the corporation, his liability for debts contracted during his membership will not pass to the transferee.⁴

¹ Lindley on Part., 4th Ed. 707.

⁴ Judson v. Rossie Galena Co., 9

² Wynne v. Price, 3 De G. & Sm. 310; Shaw v. Fisher, 2 Id. 11; Straffon, ex parte, 22 L. J. Ch. 206; Paine v. Hutchinson, L. R. 3, Ch. 388; Hawkins v. Maltby, 4 Id. 200.

Paige Ch. 598; Moss v. Oakley, 2 Hill, 265; McCullough v. Moss, 5 Denio, 567; Tracy v. Yates, 18 Barb. 152; Chesley v. Pierce, 32 N. H. 388; Windham Provident Inst. v. Sprague, 43 Vt.

³ Musgrave & Hart's Case, L. R. 5, Eq. 193.

CHAPTER XIII.

LIEN ON CORPORATE PROPERTY.

<p>§ 227. Lien of corporation on shares not implied. 228. Lien created by agreement. 229. Statutory construction with reference to lien. 230. Lien of corporation under general provisions of law. 231. Assignee of shares, how affected by lien of corporation. 232. Waiver by corporation of its lien on stock. 233. Lien of bank on paper transmitted to it. 234. Lien of bank on deposit.</p>	<p>§ 235. Lien of common carrier on freight. 236. Power to mortgage corporate property. 237. Construction and effect of mortgage of corporate property. 238. Character of rolling stock. 239. Machinery. 240. Mortgage of after-acquired property. 241. Fraud in sale under mortgage. 242. Appointment of receiver. 243. Mechanic's lien.</p>
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§ 227. **Lien of corporation on shares not implied.**—There is no lien at common law against stock for debts in favor of the corporation issuing the stock. A different rule would subvert the wholesome doctrine of the common law against secret liens. When such lien exists, it is by statutory authority, either expressed in the act of incorporation, or in by-laws authorized by the act. That a mere by-law would be sufficient to create a lien on stock for a general balance due the company in the case of trading, manufacturing, or other corporations not engaged in loaning money, has been generally denied. It is safe to say that it would not, unless notice of the by-laws were brought home to a purchaser of stock before the purchase.¹ When a by-law

¹ *Heart v. State Bank*, 2 Dev. Eq. 111; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Dana v. Brown*, 1 J. J. Marsh, 304; *Steamship Doc. Co. v. Heron*, 52 Pa. St. 280; *Bank of Attica v. Mansfs., etc., Bank*, 20 N. Y. 505; *Driscoll v. West Bradley, etc., Manf. Co.*, 59 Id. 96; *Hill v. Pine River Bank*,

provides that no stock shall be allowed to be transferred on the corporate books if the person in whose name the stock stands is indebted to the corporation, it should point out its authority for the prohibition either in its articles of association, or in some statute. Power given by a statute to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock, does not confer power to make such a by-law ; but only to direct the manner in which the stock shall be transferred.¹ Eleven indi-

45 N. H. 300 ; People v. Crockett, 9 Cal. 112 ; Anglo Cal. Bank v. Grangers' Bank, 63 Id. 359 ; People v. Miller, 39 Hun, 557 ; Bank of Louisville v. Nat. State Bank, 10 Bush. Ky. 367 ; Del., etc., R.R. Co. v. Oxford Iron Co., 38 N. J. Eq. 340 ; Case v. Bank, 100 U. S. 446 ; Nat. Bank of Zenia v. Stewart, 107 Id. 676. The rule has long prevailed in many jurisdictions that a corporation has no implied lien on the shares of its stockholders for debts due from them, and cannot hold the shares against a purchaser or attaching creditor. A different rule has been adopted in relation to dividends declared which are considered as so much money in the possession of the corporation belonging to the stockholder, and regarded as pledged toward the payment of any just debt then due from him. Hagar v. Union Nat. Bank, 63 Me. 509 ; but not as to dividends accruing after the death of the stockholder. Brent v. Bank, 2 Cranch, 517. If there is no statute or valid by-law regulating the manner of transferring shares in an incorporated joint stock company, and the stock is declared by the charter to be assignable, a simple assignment, with notice of the same to the proper officer of the corporation, although not entered on the company's books, will be sufficient to transfer the

legal right, and a *bona fide* assignee of the stock will hold it free from any equitable claims thereon of which he had no previous notice. Stebbins v. Phoenix Ins. Co., 3 Paige Ch. 350.

¹ Driscoll v. West Bradley, etc., Manf. Co., 36 N. Y. Super. Ct. 488 ; 59 N.Y. 96 ; Rosenbach v. Bank, 53 Barb. 495 ; Conklin v. Bank, Ib. 512 ; 45 N. Y. 655 ; Bullard v. Bank, 18 Wall. 594 ; Evansville Nat. Bank v. Metrop. Nat. Bank, 2 Biss. 527 ; Nat. Banking Co. v. Wiltz, 4 Woods, 43 ; Bank of Holly Springs v. Pinson, 58 Miss. 421 ; Farmers', etc., Bank v. Wasson, 48 Iowa, 336 ; Moore v. Bank of Commerce, 52 Mo. 377 ; Mobile Mu. Ins. Co. v. Cul-lom, 49 Ala. 558 ; Merchants' Bank v. Shouse, 102 Pa. St. 488 ; Case v. Bank, 100 U. S. 446 ; Williams v. Lowe, 4 Nebraska, 397. The authorities are, however, not wholly in accordance on this subject. In Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, it was held that power to make by-laws, to regulate the management of the business of the association, and to regulate the transferring or manner of transferring stock, was sufficient to authorize a by-law creating a lien. See Pender-gast v. Bank of Stockton, 2 Sawyer, 108. Where the charter of a bank gave the directors authority to make rules concerning the transferring of its stock, a

viduals, of whom G. was one, entered into an agreement to accept an act of incorporation, distributing and holding the stock amongst themselves to an amount and in a proportion stated. It was a part of the agreement that the corporation should purchase from G. land, with the buildings he was then erecting thereon, together with fixtures and machinery specified, he to complete the buildings and furnish them in a manner described. G. conveyed the land to the corporation ; but the buildings, fixtures, and machinery were not completed by him, and the corporation expended large sums in completing them. No certificate of shares had been issued to G. when he became insolvent. It was held that the corporation had no lien on G.'s shares either for arrears due thereon, or for sums paid either before or after G. became insolvent, to complete and furnish the buildings.¹ The fact that a stockholder in an insurance company has given his note for premiums of insurance, does not give the company a lien on his shares, and if the company refuses to transfer the stock to a *bona fide* assignee unless the balance due on the note is paid, and the assignee pays such balance, it will be deemed to have been paid under compulsion, and he can recover back the amount from the company. But where money for dividends on the stock has accumulated in the hands of the company, previous to a transfer, the company has a lien thereon for the unpaid balance of such a note, though the assignee will

by-law prohibiting any member from transferring his stock while he was indebted to the bank was held valid, and the indebtedness of a stockholder to the bank being proved, it was held that the bank was authorized to refuse him permission to transfer his stock. *McDowell v. Bank of Wilmington*, 1 Harring. Del. 27. See *Bank of Attica v. Mansf.*, etc., *Bank*, 20 N. Y. 505.

¹ *Mass. Iron Co. v. Hooper*, 7 Cush. 183. Had these persons by their agree-

ment proposed to form a partnership instead of a corporation, there might have been in effect a lien upon the shares in favor of the partners before the separate creditors could claim the shares as separate property. This would have resulted from the difference in the relations between a partnership and the individuals who compose it on the one hand, and a corporation and its members on the other. *Ibid.*

be entitled to the dividends subsequently made.¹ A lien is not established by the fact that no stock certificate has been issued, a certificate being evidence only, and not necessary to complete the title.²

§ 228. Lien created by agreement.—A corporation may acquire a lien upon the shares of one of its members for his indebtedness to the corporation by a special contract with him to that effect.³ The charter of a bank gave it power to establish and put in execution such by-laws, ordinances, and regulations as might be expedient for the well-ordering of the concerns of the corporation, and provided that the shares should be assignable according to such rules as should be prescribed by the stockholders of the bank. There was no by-law giving the bank a lien on shares for the indebtedness of the holder, but the stock certificates provided that the shares might be transferred "subject, nevertheless, to the indebtedness and liability at the bank of holders, according to the charter and by-laws." It was held that a stockholder by accepting the certificate was bound by it, and that if it did not strictly constitute, it was tantamount to an agreement between him and the bank that his stock should be subject to his indebtedness to the institution.⁴ It was held by the Supreme Court of Penn-

¹ Bates v. N. Y. Ins. Co., 3 Johns. Cas. 238; Rogers v. Huntingdon Bank, 12 Serg. & Rawle, 77. Where the power of forfeiture has not been expressly conferred by the terms of the charter, the directors of a corporation have no authority to declare a forfeiture of stock to the corporation for the non-payment by the holder of instalments called in. *In re* Long Island R.R. Co., 19 Wend. 37. A religious society cannot sell or forfeit the shares or rights of pew-holders unless power to do so is given by the articles of association. Where it was provided that the pro-

prietors might, at a meeting called for that purpose, tax themselves to raise money to repair their house of worship when necessary, it was held that this only contemplated a tax upon the pew-holders personally, and gave no right to levy an assessment on the pews, or to enforce payment by a sale or forfeiture of them. Perrine v. Granger, 30 Vt. 595.

² Mass. Iron Co. v. Hooper, *supra*.

³ Ibid.; Farmers', etc., Bank v. Wason, 48 Iowa, 336.

⁴ Van Sands v. Middlesex County Bank, 26 Conn. 144.

sylvania that when, by the known usage of a bank, the stock of a debtor was not transferable until the debt was paid, such usage was binding on his assignees.¹

§ 229. Statutory construction with reference to lien.—Where the act under which a bank is incorporated provides that the stock shall be assignable and transferable on the books only, but that no stockholder indebted to the bank shall make a transfer or receive a dividend until such debt has been discharged, or security to the satisfaction of the directors given for the same, the language embraces all debts, and the bank has a lien on the stock not only for the amount unpaid on the original subscription, but also for debts on account of discounts; and the bank may refuse to permit a transfer of stock until the debts of the holder are paid, although the demands are not yet due.² Such, or a similar provision is intended exclusively for the benefit and protection of the bank.³ When the lien is given in terms "for all debts actually due and payable to the corporation,"

¹ Morgan v. Bank of North Am., 8 Serg. & Rawle, 73.

² Rogers v. Huntingdon Bank, 12 Serg. & Rawle, 77; Grant v. Mechanics' Bank, 15 Id. 140; Sewall v. Lancaster Bank, 17 Id. 285. "It is well settled that the lien given by statute to a corporation upon the shares of stockholders indebted to it extends to all debts whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable, and that a stockholder indebted to the corporation, although the debt may not be due, cannot transfer his stock without the consent of the corporation." Pittsburgh, etc., R.R. Co. v. Clarke, 29 Pa. St. 146.

³ Cross v. Phoenix Bank, 1 R. I. 39; Bank of Utica v. Smalley, 2 Cowen, 770; Planters', etc., Mu. Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Mt. Holly Paper Co.'s Appeal, 99 Pa. St.

513; Anglo Cal. Bank v. Grangers' Bank, 63 Cal. 359; Bishop v. Globe Co., 135 Mass. 132. Where an act prohibits the transfer of bank stock by any shareholder indebted to the bank, the legal title to the stock remains in the bank until payment, for its security, and for the benefit of the sureties of the debtor who are in equity entitled to be subrogated to the security held by the bank. Klopp v. Lebanon Bank, 46 Pa. St. 88; Kuhns v. Westmoreland Bank, 2 Watts, 136. It would require a very clear provision of law to make nugatory the lien by giving the corporation authority to take from an indorser his security and apply it to other debts which his principal contracted with the corporation after the lien on the stock attached. Petersburg Savings & Ins. Co. v. Lumsden, 75 Gratt. 327.

the lien would not, of course, attach to paper not due at the time a transfer is demanded.¹ In *Brent v. Bank of Washington*,² BALDWIN, J., who delivered the opinion of the court, in commenting on the charter of a bank which provided that "all debts actually due and payable to the bank (days of grace for payment having passed) by a stockholder requesting a transfer, must be satisfied before such transfer shall be made unless the president and directors shall direct to the contrary," said: "Every stockholder who draws or indorses a note to procure a loan from the bank is bound to know the terms of the charter and by-laws; his signature to the note is an inchoate pledge of his stock for security; his stock gives credit to his name, and the bank grants the loan on its faith. Though the charter has not made the note a lien on the stock until the note is protested, so as to give the bank both a legal and equitable right to refuse the transfer until it is paid, yet it has given them the power to prevent a transfer on their books unless by such rules as they may prescribe; which gives them power to prevent the legal title from passing to the purchaser. Connecting this with the power to make by-laws for the government of the bank and the management of their concerns, the bank would have a strong case in equity had the latter clause of the charter been omitted." L., a stockholder in a bank, being indebted to the bank in a con-

¹ *Reese v. Bank of Commerce*, 14 Md. 271. The banking law of Ohio enacted that no shareholder in a bank should have power to sell or transfer any stock held by him in his own right so long as he was liable to the bank as principal debtor, surety, or otherwise, for any debt which had become due and remained unpaid. It was held that an attempted transfer of his stock by a shareholder on the books of a bank while he was thus indebted, could not defeat the lien of the bank given by the statute; but that an indebted-

ness incurred by the assignor after the bank had received notice of the assignment of his stock certificate, did not give the bank a lien on his shares as against his assignee, although there had been a previous indebtedness which was satisfied. Giving a bank a lien on stock carries out the principle which obtains in ordinary partnerships, that the interest of the partner is what remains after deducting his debts to the firm. *Condut v. Seneca County Bank*, 1 Ohio St. 298.

² 10 Pet. 596.

siderable amount, for which he had given the bank his promissory note, before the note fell due sold his stock. The stock certificates provided that the shares were transferable subject to the conditions in the articles of association, one of which was that no share should be transferred unless the shareholder had previously discharged all debts due by him to the bank. On the question whether the bank was entitled to refuse to transfer L.'s stock on the ground that it had a lien on it by reason of his note, the court, in deciding in the negative, said: "When a man gives his note payable at a future day, it is an essential part of the contract that he shall not be called on to pay it, and shall in no respect be molested in relation to it, until the day shall arrive, and then he is pledged to pay it. This is the contract ; and why should we say that a dealer with this bank is subject to greater liabilities, and exposed to more severe restrictions, than attach to any similar indebtedness to other persons."¹

The provision of a charter declaring the stock of a corporation personal property, and empowering the board of directors to make rules and regulations concerning its transfer subject to the general law of the State, authorizes the board to prohibit the transfer of stock until all debts due by the holder to the corporation are paid, notwithstanding such rule is inconsistent with the general law of the State governing the transfer of personal property. "In saying that the rules and restrictions on the transfer of stock should be subject to the general law, the legislature could not have intended that they should be consistent and in conformity with the law of the State governing the subject matter concerning which the by-laws were to be enacted. It could only have been contemplated by the legis-

¹ Leggett v. Bank of Sing Sing, 25 Barb. 326. A corporation is not justified in refusing to transfer on the ground that only thirty per cent. has been paid in on stock, when no more has been called for. Kahn v. St. Joseph, 70 Mo. 262. See Shenandoah R.R. Co. v. Griffith, 76 Va. 913.

lature that they should be reasonable and not contravene the general laws other than that relative to the subject about which they were prescribed. Hence, though there is a general law prescribing the manner in which personal property may be transferred, the validity of a by-law on the subject will depend upon its reasonableness and its conformity to the general laws other than that concerning the transfer of personal property. The form of certificate would have shown a purchaser that he took it subject to the rules and restrictions imposed by the by-laws of the company which put him on inquiry. Be this as it may, the words of the charter were sufficient to empower the corporation to pass such a by-law, and as the wisdom and policy of such a power may be inferred from the frequency with which it is intrusted to incorporated companies in express terms, we cannot say that the company violated its duty in imposing the restriction complained of on the right of transferring its stock. The words ‘indebted to the company’ apply as well to debts to become due as to those which are actually due.”¹ Where, however, the charter of a bank provided that no stockholder indebted to the bank for a demand due and payable should transfer his stock until the debt was paid or collateral security for its payment given to the satisfaction of the directors, and that the bank should have the first lien on all stock owned by its debtors, it was held that the phrase “debt or demand due and payable” was employed to describe debts on which money was coming to the bank as distinguished from debts due to others and merely deposited in the bank for collection, and that a debt to the bank was due and payable though the time for payment had not elapsed.²

¹ St. Louis Perpet. Ins. Co. v. Good-fellow, 9 Mo. 149, per SCOTT, J. See Mechanics' Bank v. Merchants' Bank, 45 Mo. 513.

² Downer v. Bank of Zanesville, Wright, Ohio, 477.

§ 230. Lien of corporation under general provisions of law.—When the charter gives the corporation authority to establish regulations under which the stock shall be transferred on the corporate books, a by-law "that no stockholder shall be permitted to transfer his stock while he is in default," if not opposed to any constitutional or statutory provision, and not unreasonable, or in restraint of trade, is valid. Where in such a case a corporation had the note of a firm it was held competent for it to refuse to permit the transfer on its books of stock owned by a member of the firm until the indebtedness was paid.¹ The same was held where the language of the charter was that the stock should be transferable on the books "according to such rules and by-laws, and subject to such restrictions and limitations as the stockholders at a general and regular meeting may from time to time adopt and establish."²

¹ Cunningham v. Ala. Ins. Co., 4 Ala. 652; S. P. Arnold v. Suffolk Bank, 27 Barb. 424. A statute authorizing a bank "to make by-laws for the management of its property, the regulation of its affairs, and the transfer of its stock," and providing that "the stock of the company shall be transferable in such manner as shall be prescribed by the by-laws of the company," empowers the bank to adopt a by-law that no transfer of stock shall be made upon the books until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due the bank by the person in whose name the stock stands on the books, except with the consent of the president. Pendragast v. Bank of Stockton, 2 Sawyer, 108; Knight v. Old Nat. Bank, 3 Cliff. 429. A national bank may hold shares in the capital stock of another national bank as collateral security for a loan or loans made or to be made. Nat. Bank v. Case, 99 U. S. 628. When the charter of a corporation authorizes the pass-

ing of a by-law giving the corporation a lien on its stock for the indebtedness of the owner to the corporation, such by-law can have no retrospective operation, the corporation previous to the by-law having no vested interest in the stock. People v. Crockett, 9 Cal. 11.

² Geyer v. Western Ins. Co., 3 Pittsb. 41. But a lien of the corporation for indebtedness incurred subsequent to the service of an attachment was postponed to the lien of the attaching creditor. Ib. A by-law of a bank provided that stockholders who had not paid for their stock in full or were otherwise indebted to the bank should not transfer their stock on the books of the company until the person to whom such transfer was proposed to be made should give to the company notes with satisfactory security to be approved by the president for the amount due on the stock, note, or other liability. A partnership which owned stock standing in its name on the books of the

The Hudson's Bay Company being empowered by charter to make by-laws for the better government of the company, made a by-law that if any of its members should be indebted to the company, his stock should in the first place be liable therefor, and that the company might seize and detain it. One of the stockholders becoming bankrupt, the assignees under the commission filed a bill against the company, showing the stock owned by the bankrupt, and praying an account of the profits and dividends. The defendant claimed that the bankrupt was indebted to J. S., the trustee of the company, and that the stock was helden for such indebtedness. It was held that the by-law was good, but that being a by-law to the prejudice of other creditors, it should be taken strictly, and not to extend to a debt the member did not owe in law, but only in equity, and that in the present case it was in law a debt due to J. S.¹

bank transferred the stock with all the other firm assets and property to a succeeding firm of which the bank had notice. It was held that the lien of the bank on the stock created by the by-law embraced the indebtedness of the new firm in its subsequent transactions with the bank. *Planters', etc., Mu. Ins. Co. v. Selma Savings Bank, 63 Ala. 585.*

¹ *Child v. Hudson's Bay Co., 2 P. Wms. 207; 1 Strange, 645.* The National Banking Act of 1864, by repealing the 36th section of the act of 1863, manifested a purpose to withhold from banking associations a lien upon the stock of their debtors. In a suit against a national bank for refusing to permit a transfer of the stock on the ground that the stockholder was indebted to the bank, it appeared that the bank was organized under the act of 1863, and that it had adopted a by-law that the stock should be assignable on its books subject to the provisions

and restrictions of the act of Congress, among which was the one contained in the thirty-sixth section, that no shareholder should have power to sell or transfer any share so long as he was liable to the bank for any debt due and unpaid. The court said: "Congress evidently intended by leaving out of the act of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they deal with other people." In such case a national bank would have no lien on its stock for an indebtedness of the owner, except to secure a pre-existing debt contracted in good faith, and a by-law of a bank could not give such a lien. A pledge of the stock by the owner to secure the bank for a loan would not be "securing a pre-existing

Where the articles of association under which a bank is organized provide that the transfer of shares "shall be made and taken expressly subject to all the conditions and stipulations contained in these articles," it is not in the power of the directors of the bank to restrain the transfer of its stock by a by-law that "no transfer of shares can be made unless the person making the same shall previously discharge all debts and demands due or contracted by him or her to the bank unless by consent of the board." A distinct provision being contained in the act of organization assigning the articles of association as the instrument in which the rules respecting transfers are to be contained, it is not in the power of the association to agree in the articles that the matters which the legislature had declared might be contained in the articles should be the subject of regulation by the directors in forming their by-laws.¹

§ 231. Assignee of shares, how affected by lien of corporation.—When a corporation has a lien upon the stock for the indebtedness of the holder, the lien cannot be impaired without a regular transfer of the shares on the books of the corporation according to law, the interest of the stockholder passing, in case of assignment, to the assignee, subject to the claim of the corporation against the assignor.²

debt contracted in good faith." Bank v. Lanier, 11 Wall. 369. And see Bullock v. Bank, 18 Id. 589; Evansville Nat. Bank v. Metrop. Nat. Bank, 2 Biss. 527; Rosenback v. Salt Springs Nat. Bank, 53 Barb. 495; Conklin v. Second Nat. Bank, Id. 512, *note*; 45 N. Y. 655; Knight v. Old Nat. Bank, 3 Cliff. 429. A national bank organized under the law of 1864 cannot, even by provisions framed with a direct view to that effect in its articles of association and by direct by-laws, acquire a lien on its own stock held by persons who are its debtors. Delaware, etc.,

R.R. Co. v. Oxford Iron Co., 38 N. J. Eq. 340.

¹ Bank of Attica v. Manufacturers', etc., Bank, 20 N. Y. 501.

² Bank of Utica v. Smalley, 2 Cowen, 770; Gilbert v. Manchester, etc., Co., 11 Wend. 627; Union Bank v. Laird, 2 Wheat. 390; Tuttle v. Walton, 1 Ga. 43. Where the charter gives the corporation a lien upon the stock of any holder against whom the company has a claim or demand, the lien extends in equity to all stock actually owned by such a debtor, whether standing in his own name or in the names of other per-

On the 21st of November, 1861, there were standing on the books of a corporation in the name of R. 480 shares of stock. On the 27th of the same month R. made a general assignment for the benefit of creditors. Some time previous to this he had assigned to A. 200 shares of the stock, and to P. the remaining 280 shares, as security for debts he owed them, which were never paid. These transfers were not entered on the books of the corporation, but it had notice of them before the 21st of January, 1862. Previous to the general assignment, R. was indebted to the corporation in a larger amount than the market value of the shares. In November, 1861, N. obtained a judgment against R., and caused an execution to be issued. On the 21st of January, 1862, the sheriff asked for and received from the secretary of the corporation a certificate that there were 480 shares of stock standing on the corporate books in the name of R., against which the corporation had a lien for his indebtedness, the amount of which was given. In February, 1862, the sheriff sold the stock, pursuant to the levy, to N. for five dollars. In April, 1862, R. was notified by the corporation that unless his debt to it was paid within sixty days the stock would be sold, which, R. failing to pay, was done, and bought in by the corporation for a sum above the then market price. In July, 1866, N. demanded of the proper officer of the corporation an account of the stock bid off on the execution in February, 1862, of dividends, increase, and profits, and the issue to him of a certificate of

sons as his trustees, but not as against *bona fide* purchasers of stock without notice of such equitable lien. Stebbins v. Phoenix Ins. Co., 3 Paige Ch. 350; See Planters', etc., Mu. Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Mobile Mu. Ins. Co. v. McCallum, 49 Id. 558; Grant v. Mechanics' Bank, 15 Serg. & Rawle, 140; Pittsburgh, etc., R.R. Co. v. Clarke, 29 Pa. St. 146; Leggett v. Bank of

Sing Sing, 24 N. Y. 283; Reese v. Bank of Commerce, 14 Md. 271; McCready v. Rumsey, 6 Duer, 574; Petersburg Savings, etc., Co. v. Lumsden, 75 Va. 327; Hall v. U. S. Ins. Co., 5 Gill, 484; Schmidt v. Hennepin Co., 29 Northwestern Reporter, 200; Kahn v. Bank of St. Joseph, 70 Mo. 262; First Nat. Bank of Hartford v. Hartford, etc., Ins. Co., 45 Conn. 22.

said stock, at the same time offering to pay any lawful lien the corporation had thereon. The act under which the corporation was organized provided that it should at all times have a lien upon the stock of its members for all debts due from them to the corporation, which might be enforced by advertisement and sale. The request of N. being refused, he filed a bill against the corporation for relief. It was held that the defendant had a lien upon the stock to the extent of its claim against R., which, if it had ever been discharged, must have been by the sale of the stock and attendant proceedings at the instance of the corporation, and with the assent of R., in 1862; that the same act that discharged the lien extinguished the right of complainant, since his purchase was necessarily subject to the lien, and the proceedings provided by law for the satisfaction of it; that the statutory lien upon the stock possessed by the corporation was neither displaced, overreached, or impaired by the execution, or by the sale of the stock under it; that the proceedings of the complainant were not carried far enough to give him a right to require a certificate of the stock, or to confer upon him the privileges, or cast upon him the burdens and liabilities of a stockholder; that he could not stop short of offering to pay the debt due the corporation, and still retain the right to pay it or not at any time thereafter as the corporation should be successful or unsuccessful; and that in order to ask the assistance of equity, he should have offered satisfaction within such reasonable time as the circumstances of the case suggested.¹

¹ *Newberry v. Detroit, etc., Co.*, 17 Mich. 141. COOLEY, Ch. J., said, that when complainant's levy was made, R. had no interest in the stock to be levied upon, and the levy was therefore ineffectual; that a judgment creditor who buys with full knowledge, can get by his levy and purchase nothing that the debtor or himself cannot claim. Plaintiff bank

caused a writ of attachment to be sued out against the shares of a stockholder in defendant bank. When the officer called at the bank for the purpose of attaching the shares as the property of the shareholder, he was informed by the cashier that the shares were held by the bank, pledged for the payment of a note of the shareholder; and also

McKinney was the owner of stock in a bank, the charter of which provided for the levy and sale of the stock by a creditor of the holder, subject, nevertheless, to any debt due from the latter to the bank. A note drawn to the order of McKinney and Armstrong was discounted by the bank, and at maturity was duly protested for non-payment. Subsequent to this, one Mehaffy obtained a judgment against McKinney, on which execution was issued, and his shares sold, Mehaffy being the purchaser. More than two years afterward the bank obtained judgment against McKinney and Armstrong on the note, and the stock of McKinney levied on, which judgment was transferred to Armstrong, he having paid the bank in full therefor, and in pursuance of said judgment and execution, the stock and the dividends due thereon were sold by the sheriff to Armstrong. Armstrong then demanded that the stock should be transferred to him on the books of the bank, which the bank refused to do, and as the stock was also claimed by Mehaffy, he was allowed to interplead. The court said : "McKinney, the proprietor of the stock in question, and the plaintiff Armstrong, being joint indorsers on the note, became debtors to the bank on the day of the protest of the note. From that time until final satisfaction, they were debtors to the bank, and stock standing in the name of either, by operation of law became pledged for the liquidation of the debt. Mehaffy's debt accrued, and his seizure

that the title of the shareholder, if he had any, had been assigned to another who had already demanded a transfer of the shares, which the bank had refused. The plaintiff afterward obtained judgment against the shareholder, and the shares were seized and sold on execution. At the time and place of sale, notice was given by the assignee and by the defendant bank of their respective claims on the shares. The plaintiff bought in the shares at the sheriff's

sale, and demanded a transfer, which defendant refused. It was held that whether the defendant bank could hold the shares to its own use or not, the assignment of them having been made in good faith, and for an adequate consideration, prior to the attachment, the transfer of whatever interest the shareholder had in them at the time was valid as against the plaintiff. *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454.

and sale of the stock took place, subsequently to the period when the statutory lien of the bank attached, and hence the sale did not divest the lien. . . . When the bank assigned its judgment against McKinney and Armstrong to Armstrong, the transfer carried with it any rights of the bank under the judgment and execution, and unless the receipt of the debt from Armstrong, one of the defendants, must be taken as a satisfaction of it, he has all the rights of the bank, and is entitled to all its remedies by virtue of the assignment."¹ A. R., by a will which was admitted to probate in 1818, bequeathed to his wife for life certain shares of stock in a bank, remainder to his son, D. R. In 1829, D. R. assigned to Q. all of his interest in the stock. In 1845, the widow of A. R. died, and Q. and D. R., the latter being the sole surviving executor of A. R., demanded of the bank a transfer of the shares, which the bank refused, claiming a lien upon them by virtue of a judgment it had obtained against D. R. in 1824. It appeared that in the year 1829, D. R. applied for and obtained the benefit of the insolvent act. The charter of the bank provided that all debts, actually due the bank by a stockholder offering to transfer his shares, must be discharged before such transfer. It was held that one dealing with a shareholder in reference to his stock, must be deemed to have taken his equitable assignment, subject to the rights of the bank, of which he was bound to take notice; that the indebtedness of D. R. to the bank was not barred by the statute of limitations; which operated only to bar the remedy, and not to extinguish the cause of action; and that the bank committed no default in refusing to transfer the stock.²

¹ *West Branch Bank v. Armstrong*, 40 Pa. St. 278.

² *Farmers' Bank v. Iglehart*, 6 Gill, 50; *Geyer v. Western Ins. Co.*, 3 Pittsb. 4. One Johnson was the holder of stock in an insurance company, which stock he assigned to a bank to secure the payment of a debt, and also as security for further advances. Subsequently he accepted a draft which was cashed by the firm of Ketcham, Berdan & Co. The draft was protest-

The lien given by law to a corporation on its stock for the debts due by the owner of it, is not lost by the assent of the corporation to the transfer of the stock to an assignee of the owner for the benefit of creditors; the assignee in such case standing in no better situation than the assignor, and neither he, nor the creditors whom he represents, being purchasers for a valuable consideration without notice.¹

ed for non-payment, and all of the parties liable thereon became insolvent the following day. Ketcham, Berdan & Co. were the bankers of the insurance company, and as such had a large amount of its funds on deposit. Ketcham, therefore, acting as president of the company, bought the protested draft from the bankers, and had the face of it, together with protest fees, charged to his company on the books of the bank, and, in the name of the banking firm, indorsed the draft to the company. A few days afterward the bank applied to have the stock transferred to it on the books of the company, which the company refused to do, claiming a lien by reason of the indebtedness of the holder. The charter of the company provided that no stockholder indebted to the company should be permitted to make any transfer or receive any dividend until such debt was paid, or secured. It also provided that the company might loan its funds or any part of the same to individuals or public corporations, provided it should not in any manner engage in the business of banking. It was held that the real object of the parties was not to obtain a loan of money, and therefore not within the powers of the company; that it was nothing more than an effort by Ketcham, Berdan & Co., with the aid of the insurance company, to obtain an advantage in the anticipated struggle over the effects of an insolvent debtor; that the company

had no power or capacity under its charter to receive an assignment of the draft for any such purpose, and its reception created no debt in its favor which the company could enforce by a sequestration of the stock. *White's Bank v. Toledo, etc., Ins. Co.*, 12 Ohio St. 601.

¹ *Dobbins v. Walton*, 37 Ga. 614. The charter of a bank provided that the bank should hold a lien on the shares of any stockholder who was indebted to it, and that such shares should not be assigned or transferred until the debt was paid or discharged. Two of the stockholders who owed the bank much more than the value of their stock, made an assignment for the benefit of creditors. The court said: "Banks have no claim upon the stock held by debtors on account of any agreement or contract with them. Their claim to the stock as ultimate security for the payment of their debts, arises not out of contract, but depends upon and must be secured through the preference given them by the law. When the bank shall have applied the whole of the proceeds of the bank stock to the payment of its debts, equity demands that it shall be postponed until the general creditors have been indemnified out of the general and unencumbered estate, and when this is done, the balance will then be distributed *pari passu* among all the creditors." *German Security Bank v. Jefferson*, 10 Bush. Ky. 326; following

§ 232. Waiver by corporation of its lien on stock.—A corporation waives any lien it may have on its stock when it permits a transfer of the stock to a stranger, and issues to the transferee a certificate reciting that the shares are transferable when the liabilities of the holder to the corporation are paid. If the corporation has a right to refuse to issue a certificate, or allow a transfer, until the indebtedness of the original holder of the stock is discharged, it has, nevertheless, power to waive the right and to allow the transfer and issue a certificate without insisting upon such payment.¹ The charter of a bank provided that no shares of its stock should be transferred within a year from the date of the charter. Within the year, one of the stockholders assigned his shares, and the bank accepted from the assignee the final instalment due thereon, though the officers of the bank at the time notified the assignee that the shares could not be transferred for some months to come. Subsequent to this, but within the year, the bank loaned the original stockholder money on his note which was not paid at maturity. After the year had expired, and a dividend been declared, the assignee demanded from the bank a transfer of the shares, and the payment to him of the dividend, which the bank refused to do, claiming a lien under a by-law for the indebtedness of the original stockholder. It

Northern Bank of Ky. v. Keizer, 2 Duvall, 169, where, in the case of a firm, there was partnership property and partnership debts, and individual property and individual debts.

¹ Nat. Bank v. Watsontown Bank, 105 U. S. 217; Johnson v. Laflin, 103 Id. 800; Upton v. Burnham, 3 Biss. 431; Hill v. Pine River Bank, 45 N. H. 300; Hall v. U. S. Ins. Co., 5 Gill, 484; First Nat. Bank of Hartford v. Hartford Ins. Co., 45 Conn. 22; Bank of Am. v. McNeil, 10 Bush. Ky. 54; Young v. Vough, 23 N. J. Eq. 325; Hoffman

Steam Coal Co. v. Cumberland Coal, etc., Co., 16 Md. 466; Bishop v. Globe Co., 135 Mass. 132. A corporation is not estopped to assert its lien by what was said by a person in charge of the transfer book when the holder of the certificate presented it and requested a transfer, it not appearing that this person had any authority except to receive requests and to communicate with the proper officers, or that he had any knowledge of the assignor's indebtedness to the corporation. Bishop v. Globe Co., 135 Mass. 132.

was held that although, owing to the clause in the charter, the assignment of the shares within the year gave the assignee no right to demand a certificate, or in other respects to be regarded as owner of the shares during the year, yet the assignment passed the equitable interest which, after the year, might be converted into legal property ; and that, admitting the by-law to be operative under ordinary circumstances, it ought not to avail in the present instance, the loan having been made by the bank after notice given it by the assignee of his claim to the shares, and after the bank had received from the assignee the instalment due on them.¹ Under a statute providing that the board of directors of a corporation may at its option retain a dividend and prohibit a transfer of the stock of any stockholder indebted to the corporation, until the option is exercised no lien on the stock is created, and consequently no right to retain it for the satisfaction of debts.² Where a bank under its articles of association and by-laws is entitled to refuse to transfer its stock while the holder is indebted to the bank, but it issues a form of certificate omitting reference to such restriction, and stating that no transfer will be made on its books except on return of the certificate, and a stockholder has delivered his certificate upon sale or pledge to a third party, such third party acquires a paramount equity in the stock over the bank.³ Where the officer in charge of the business of the corporation assured the plaintiff that certain stock was unencumbered, and that he might safely take it in pledge to secure a loan to the holder, which upon the faith of this assurance the plaintiff did, it was held that the question whether the admission thus made by the agent of the corporation was true or false was not open to inquiry, but that as the plaintiff acted

¹ Nesmith v. Washington Bank, 6 Pick. 324.

² Lee v. Citizens' Nat. Bank, 2 Cinn. 298.

³ Perrine v. Fireman's Ins. Co., 22 Ala. 575.

on it, it must stand as an estoppel and determined the rights of the parties.¹ A testator left forty shares of bank stock to be divided among his four children, one of whom was a minor. The three children who had attained their majority assigned their three-fourths of the stock, and, with the consent of the bank, it was duly transferred to their assignee. Subsequently, upon the fourth child coming of age, the remaining ten shares of stock were assigned by him to the plaintiff for value; but the bank refused to permit a transfer, claiming a lien on the stock by reason of judgments against two of the other children to an amount greater than the value of the stock. It was held that each child was entitled to one-fourth, not of each share, but of the forty shares which were divisible, giving each child ten shares; that when the bank allowed the transfer of three-fourths of the shares, it assented to the severance, and as a matter of necessity was affected with notice that the other fourth was the property of the minor child, and that the bank had no power to sequestrate the stock of the latter.²

§ 233. Lien of bank on paper transmitted to it.—Where it appears from the evidence that for a long time there have been mutual and extensive dealings between two banks, and an account current between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged costs of protest, postage, etc.; and, upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them, on its own account, either bank has a right to retain the proceeds of notes then in its hands to cover the balance of account due upon these transactions, without regard to who may be the real owner of such paper, the same as if an ad-

¹ Moore v. Bank of Commerce, 52 Mo. 377.

² Presbyterian Cong. v. Bank of Carlisle, 5 Barr. 345.

vance of money had been made specifically on the paper. Possession of the paper is *prima facie* evidence that it is the property of the bank remitting it; and, without notice to the contrary, the bank that receives it is entitled so to treat it, and is under no obligation to inquire whether it is held as agent or owner.¹ A firm failed, owing a bank, and was adjudged bankrupt. Before its failure, and while in good credit, the firm handed to the bank for collection a number of drafts, on which the bank, after the filing of

¹ *Bank of Metropolis v. New England Bank*, 1 How. 234; S. C. 6 Id. 212. In this case the Bank of the Metropolis was the bank that received the paper in controversy, the Commonwealth Bank the one which remitted it, and which failed owing the Bank of the Metropolis a balance on account and the New England Bank the real owner of the paper. The case coming before the United States Supreme Court on appeal from the circuit court, it was remanded with the following instructions: "If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis at the time of the mutual dealings between them had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account of the Commonwealth Bank. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the ne-

gotiable paper transmitted or expected to be transmitted in the usual course of the dealings between the two banks. But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank." Where there is no right to retain collateral after a specific loan upon it has been paid, there is no lien upon it after payment, the right of a debtor to pay a claim and take up the collateral, not being reconcilable with a right in the creditor to hold it for any general balance. A usage giving to persons engaged in discounting, buying, advancing on, or selling bills or notes, a lien for a general balance against their customer, will not be presumed to exist, but must be proved. *Grant v. Taylor*, 35 N. Y. Supr. Ct. 338, affirmed 52 N. Y. 627.

the petition in bankruptcy, collected a given sum. It was held that the money so collected might be applied by the bank toward the payment of the indebtedness of the firm to the bank, and need not be turned over to the assignee for general distribution.¹

§ 234. Lien of bank on deposit.—An ordinary deposit in a bank, made in the usual course of business, creates the relation of debtor and creditor, and does not constitute a case of technical bailment, as it would do if the same amount of money were placed in a bag or keg and specifically received for by the bank to be delivered on demand, and the bank has a right to withhold out of such deposit the amount of a debt due it from the depositor, who is only entitled to call for the balance.² But to create a lien in favor of the bank there must be an actual existing indebtedness. A bank having discounted a bill of exchange in favor of A. and B., subsequently made an assignment for the benefit of creditors, and afterward the bill of exchange matured and was protested for non-payment. The bank had no lien on the deposit of A. and B. at the date of the deposit which would have prevented their drawing out the whole balance of cash to their credit. This right passed by the assignment, and no notice was necessary to perfect the right in the assignee, except only that in default of notice the bank might have so dealt as by its subsequent acts to have affected his rights. The assignee was therefore held

¹ *In re Farnsworth*, 5 Biss. 223.

² *Commercial Bank v. Hughes*, 17 Wend. 94; *In re Williams*, 3 Ired. Eq. 346; *State Bank v. Armstrong*, 4 Dev. 519; *Boyden v. Bank of Cape Fear*, 65 N. C. 13; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Bank of the Republic v. Millard*, 10 Wall. 152; *In re Bank of Madison*, 5 Biss. 515; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N.

Y. 82; *Graves v. Dudley*, 20 Id. 74; *Marsh v. Oneida Cent. Bank*, 34 Barb. 298; *Buchanan, etc., Co. v. Woodman*, 1 Hun, 639; *Jordan v. Shoe & Leather Nat. Bank*, 12 Id. 512; *Davis v. Smith*, 29 Minn. 201; *Knecht v. U. S. Savings Inst.*, 2 Mo. App. 563. See *Detroit Savings Bank v. Burrows*, 34 Mich. 153.

entitled to the balance standing to the credit of A. and B. in the bank at the time of the assignment.¹

When a bank accepts a deposit for a particular and special purpose, it cannot, as against a creditor to whom the fund has been pledged, claim the right to divert the fund from that purpose, without the assent of the depositor, on the pretext that the bank has suffered the depositor to overdraw an account opened for general purposes. Hence a bank which has received money from the State for the payment of the principal and interest of a debt contracted for a specified enterprise, cannot divert the money from its legitimate object, to the prejudice of holders of coupons issued on the credit of the fund, by applying it to a general balance against the State. In such a case, the bank is the agent of the holders of the coupons to the amount set apart for their payment, and it will not avail it to object that the coupons are held by the parties demanding their payment as collateral security, the bank having nothing to do with the rights existing between the pledgor and pledgee.² In a late case in the Supreme Court of the United States it was truly said by the court that "Although the relation between a bank and its depositor is that merely of debtor and creditor, and the balance due on the account

¹ Beckwith v. Union Bank, 4 Sandf. 604, aff'd 9 N. Y. 211. In an action against a bank to recover a balance remaining therein at the death of the plaintiff's intestate, the defendant sought to set off the note of the deceased which fell due several days after his death. The court, in holding that the set-off could not be allowed, said: "We think that the statute means that for a demand to be set off against an executor or administrator in an action brought by him, it must have been due and payable from the decedent in his lifetime." Jordan v. Nat. Shoe & Leather Bank, 74 N. Y. 467, per FOL-

GER, J., aff'g s. c. 12 Hun, 512. In the court below, DANIELS, J., said: "The policy as well as the requirements of the law concerning the payment of debts of deceased persons is, that they shall participate equally in the assets of the estate, so far as they may be required for that purpose, and that would be defeated by construing this section of the statute as allowing the set off of demands accruing and becoming due after the death of the deceased debtor." See First Nat. Bank v. Mason, 95 Pa. St. 113.

² Bank of U. S. v. Macalester, 9 Pa. St. 475.

is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belongs to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account. . . . Ordinarily a lien attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner of which the bank has notice either actual or constructive."¹

§ 235. Lien of common carrier on freight.—A common carrier has a lien on goods in its possession transported over its route for the freight;² unless the owner has a claim against the company equal to or exceeding the amount of the freight.³ A relinquishment of the possession of the property by the carrier is an abandonment of the lien, and an undivulged intent on its part that the lien shall continue notwithstanding the delivery of the property in no respect qualifies the act. But if the carrier is induced to surrender possession of the property by fraud or trick, the lien is not thereby divested.⁴ Plaintiff shipped several cargoes of coal over defendant's railroad, which, on arrival, were unloaded into bins on the defendant's land by employés of plaintiff.

¹ Nat. Bank v. Ins. Co., 104 U. S. 54, per MATTHEWS, J.

² Langworthy v. New York, etc., R.R. Co., 2 E. D. Smith, 195; Briggs v. Boston, etc., R.R. Co., 6 Allen, 246; Stevens v. Boston, etc., R.R. Co., 8 Gray, 262.

³ Dyer v. Grand Trunk R.R. Co., 42 Vt. 441. When goods are conveyed

by a different route than the one agreed to in the contract with the owner, there is no lien for freight, and if the goods are retained by the corporation under a claim of lien, an action may be maintained for their value. Marsh v. Union Pacific R.R. Co., 3 McCrary, 236; 9 Fed. Rep. 873.

⁴ Bigelow v. Heaton, 4 Denio, 496.

From time to time plaintiff took away from the bins a large part of the coal, and the defendant claimed what remained under a lien for unpaid freight. It was held that the fact that the plaintiff performed the labor of unloading the coal from the cars, did not divest the possession of the defendant, and that the mingling of the several cargoes indiscriminately in the bins by the plaintiff, so that they could not be distinguished, extended the lien upon each, to the whole quantity.¹

Where a bill of lading stipulates that the cargo shall be delivered to the consignee, "he paying freight and charges," salvage paid by the carrier comes within the terms of the contract between the parties, and is to be paid at the time the freight is payable, and the carrier has a lien on the cargo for the same. That the carrier had delivered part of the cargo does not divest him of his lien on what remains in his possession for the full amount of unpaid freight and charges.² If a consignee is in default in not receiving his goods from the carrier in the time required by the bill of lading, the carrier has a right to store the goods. In such case the warehouseman acts under the authority of the carrier, and his possession is that of the carrier for the purpose of preserving the lien.³ When there is a regulation and usage of a railroad company that car loads of freight of a specified kind shall be unloaded by the consignee within twenty-four hours after he is notified of their arrival, and that for delay beyond that time in unloading, the consignee shall pay two dollars a day for each car so delayed, which regulation and usage are known to the consignee, they enter into and form

¹ Lane v. Old Colony, etc., R.R. Co., 14 Gray, 143. Prewitt, 46 Ala. 63; Culbreth v. Phila., etc., R.R. Co., 3 Houston Del. 392;

² Chicago, etc., R.R. Co. v. Northwestern Union Packet Co., 38 Iowa, 377. Mohr v. Chicago, etc., R.R. Co., 40 Iowa, 579; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284;

³ Western Transp. Co. v. Barber, 56 N. Y. 544; Mobile, etc., R.R. Co. v. Cahn v. Michigan, etc., R.R. Co., 71 Id. 96.

part of the contract, and the company has a lien on the goods as warehouseman.¹ Where it was the general custom of a railroad company, which was known to the consignee, that freight must be removed within forty-eight hours after its arrival, or that one dollar a day for each car detained would be charged for such detention, and the notice to the consignee of the arrival of his freight stated that "this company will assume no responsibility in regard to property after its arrival here," it was held that the company had no lien for delay in taking the goods from the cars. In such a case the character of warehouseman is expressly disclaimed by the company in its notice. The delay constitutes a claim in the nature of demurrage, and does not fall within the principle of transactions which give a lien.²

A carrier cannot hold goods by virtue of a lien for back freights;³ nor can goods received, though innocently, from a wrong-doer, be detained by the carrier against the owner until the freight is paid.⁴

§ 236. Power to mortgage corporate property.—Though at one time questioned, it is now well settled that the general right of a corporation to borrow money implies the power to mortgage its property to secure payment;⁵ and a power to purchase land required for the prosecution of the business

¹ Miller v. Mansfield, 112 Mass. 260.

² Crommelin v. New York, etc., R.R. Co., 4 Keyes, 90; 1 Abb. N. Y. Ct. of App. Decis. 472; 10 Bosw. 77.

³ Leonard v. Winslow, 2 Grant's Cas. 139; Wallis v. London, etc., R.R. Co., L. R. 5, Exch. 62.

⁴ Robinson v. Baker, 5 CUSH. 137; Stevens v. Boston, etc., Co., 8 Gray, 262; Clark v. Lowell, 9 Id. 231; Gilson v. Gwinn, 107 Mass. 126; 9 Am. R. 13. See Ill., etc., R.R. Co. v. People, 19 Ill. App. 141.

⁵ Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280; Susquehanna Bridge

Co. v. Genl. Ins. Co., 3 Md. 305; Burr

v. McDonald, 3 Gratt. 206; Richards v. Merrimack, etc., R.R. Co., 44 N. H. 127; Miller v. Chance, 3 Edw. Ch. 399; Covington v. Covington, etc.

Bridge Co., 10 Bush. Ky. 69; Burt v. Rattle, 31 Ohio St. 116; Curtis v.

Leavitt, 15 N. Y. 9; Leavitt v. Blatchford, 17 Id. 521; Parish v. Wheeler, 22 Id. 494; Nelson v. Eaton, 26 Id. 410; Pennock v. Coe, 23 How. 117; Pierce v. Milwaukee, etc., R.R. Co., 24 Wis. 551. See Steiner's Appeal, 27 Pa. St. 313; Hatch v. Coddington, 95 U. S.

48.

of the corporation, implies a power to give a mortgage to secure debts.¹ This implied power does not, however, embrace franchises, which can only be mortgaged by express legislative sanction.² But, although where the charter of a railroad company authorizes it to borrow money, and, for the purpose of securing repayment, to execute a mortgage, this does not authorize the company to pledge or mortgage the franchise of being a corporation unless such authority is given in express terms, yet the same objection does not apply to the franchise of the corporation to maintain its road and make profit from its use. That franchise is so far connected with the real estate of the company that by a mortgage of the one the other may be deemed to pass, if such appears to have been the intention of the legislature.³

¹ Jackson v. Brown, 5 Wend. 590; Gordon v. Preston, 1 Watts, 385; Taber v. Cincinnati R.R. Co., 15 Ind. 459; Watts' Appeal, 78 Pa. St. 370; West v. Madison County Agr. Board, 82 Ill. 205; M'Allister v. Plant, 54 Miss. 106; *In re Patent File Co.*, L.R. 6, Ch. 83. Power to sell a railroad includes the power to mortgage it and all of its franchises, except the franchise of being a corporation. Branch v. Atlantic & Gulf R.R. Co., 3 Woods, 481.

² Com. v. Smith, 10 Allen, 448; Richardson v. Sibley, 11 Id. 65; East Boston Freight R.R. Co. v. Eastern R.R. Co., 13 Id. 422; Hendee v. Pinkerton, 14 Id. 381; Pierce v. Emery, 32 N. H. 507; Susquehanna Canal Co. v. Bonham, 9 Watts & Serg. 27; Wood v. Bedford, etc., R.R. Co., 8 Phila. 94; Atkinson v. Marietta, etc., R.R. Co., 15 Ohio St. 21; Arthur v. Commercial Bank, 17 Miss. 394; Stewart v. Jones, 40 Mo. 140; State v. Morgan, 28 La. Ann. 482; Daniels v. Hart, 118 Mass. 543; Troy, etc., R.R. Co. v. Kerr, 17 Barb. 601; Pullan v. Cincinnati, etc., R.R. Co., 4 Biss. 35.

³ Coe v. Columbus, etc., R.R. Co., 10 Ohio St. 372. The authority to mortgage the franchises of a railroad company necessarily implies the power to sell the franchises so mortgaged, and to transfer them with the corporeal property of the company to the purchaser. Memphis R.R. Co. v. Commissioners, 112 U. S. 609; New Orleans, etc., R.R. Co. v. Delamore, 114 Id. 501. Strictly speaking, the franchise to exist as a corporation is not a corporate franchise or a franchise of the corporation. It is a franchise of the individual corporators who are shareholders of the capital stock, and pertains to them as such corporators; by which they are endowed with the privilege and capacity of being constituted into and co-operating together as a body politic, with power of succession, and without individual liability. It follows that the corporation as such, in its collective capacity, or by its board of directors, has no more power to sell this franchise thus pertaining to the corporators individually, than it has to sell their paid-up shares of the capital

The absence of power on the part of a corporation to mortgage its property may be cured by subsequent legislative recognition and ratification.¹

§ 237. Construction and effect of mortgage of corporate property.—When a railroad company is authorized to mortgage its whole property, including not only the road-bed and the structures connected with it, but all the rights and franchises of the company, power is conferred to reconstruct or repair the road. The mortgage security must depend upon the implied covenant of the company to keep the original structure in running order so that it can earn what is required for the discharge of the accruing interest, and eventually the principal debt. It is equally necessary to the full enjoyment of the franchise conferred upon a railroad company that the corporation should maintain depots and grounds connected with them, machine-shops, and other establishments for the manufacture as well as for the repair of its engines and cars. The same power must be given, either expressly or by necessary implication, to own or rent suitable buildings to accommodate its different employés in the transaction of their daily duties, as bookkeepers, clerks, and cashiers, as well as to furnish a suitable place in which directors may hold their meetings. It follows that the company may provide furniture proper for its different offices, which, though practically separate from and forming no immediate part of the railroad, its appurtenances, fran-

stock. The interest of each stockholder in this franchise is transferred with his shares, and passes with them from one individual to another. Meyer v. Johnston, 53 Ala. 237.

¹ White Water Valley Canal Co. v. Valette, 21 How. 414; Portland, etc., R.R. Co. v. Kennebec, etc., R.R. Co., 59 Me. 9; Shaw v. Norfolk R.R. Co., 5 Gray, 162; Richards v. Merrimack & Conn. R.R. Co., 44 N. H. 127. See Black River & Utica R.R. Co. v.

Barnard, 31 Barb. 258; Elwell v. Grand St., etc., R.R. Co., 67 Id. 83; Oroville R.R. Co. v. Plumas Co., 37 Cal. 354. A committee of a religious society authorized to sell certain land of the society for the purpose of raising money to pay the general indebtedness of the society, cannot give a mortgage to secure the creditors, and the defect in such mortgage is not cured by the vote of a subsequent meeting. Hubbard v. German Cath. Cong., 34 Iowa, 31.

chises, or machinery, is still so closely connected with the management of the road, and the interest of the stockholders and creditors, that it cannot be dispensed with and the purposes of the railroad be accomplished. But no company has the right to permit its agents to divert the corporate funds from their legitimate purpose by providing unnecessary or costly offices, or office furniture, for its subordinates.¹

Where a mortgage by a railroad company conveys the road, locomotives, engines, superstructure, rails, and other materials used thereon, as the road could not be operated without fuel, wood, or coal, which is necessarily required for that purpose, is embraced in the grant. But the company's right of redemption is a leviable interest which may be sold on execution; though the purchaser at the sheriff's sale will not be entitled to possession until he complies with the conditions of the mortgage.²

D. filed a bill to foreclose a mortgage given to him as trustee by a railroad company to secure the payment of certain bonds therein described. The mortgage embraced "the road built and to be built," including the right of way and all other appurtenances belonging thereto, and all franchises, rights, and privileges of the company to the same. More than eight months after this mortgage had been registered, one W. entered into an agreement with the company to complete the first section of the road and furnish all the materials, and in the contract it was agreed that he should have and keep possession and control of the road and its earnings until the company made full payment

¹ *Ludlow v. Hurd*, 1 Disney, 552. In this case, a master was appointed to examine and report if any part of the office furniture levied on by the sheriff could be disposed of without injury to the company.

² *Coe v. McBrown*, 22 Ind. 252. Where a company having transacted

business and incurred debts on which judgments are recovered, is afterward legally organized as a corporation, and gives certain mortgages on its property, the judgments are entitled to be preferred in payment over the mortgages. *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238.

of what was due him under the contract. It was held that the trustee took the road "built and to be built," and all future acquired property specifically enumerated in the mortgage; that the contractor could acquire no greater interest in the road than was held by the company; that when the contractor accepted the agreement he must have known that he took the road subject to the rights of the bondholders; and that his possession under the contract would give him no precedence over the bondholders, unless all of them joined with the company in making the contract.¹

The object of the original act of incorporation of the Morris Canal and Banking Company was to construct a canal from the Delaware River to the tide waters of the Passaic at Newark. By a subsequent act, power was given to extend the canal from Newark to the Hudson River. Afterward an act was passed authorizing the com-

¹ Dunham v. Cinc., etc., R.R. Co., 1 Wall. 254, DAVIS, J., dissenting. Plaintiffs delivered to a railroad company certain railroad iron under a written contract providing that the iron should be laid by the company in a separate part of the track, of which a certificate was to be given, showing where it was laid; that the property in the iron should remain in the plaintiffs until paid for; and that if the iron was not paid for according to agreement the plaintiffs should have the right to take possession of it wherever it might be and sell it. It was held that the right of the plaintiffs was not divested or affected by a subsequently executed mortgage of the road to trustees for bondholders. The court said: "The bondholders claim through the trustees under a law which was passed after the agreement with the plaintiffs was made, and after they had parted with the iron in execution of the agreement.

If notice was given to the trustees by the plaintiffs, it was all the notice that could be given." Haven v. Emery, 33 N. H. 66. While the extension of the power of a railroad company to pledge or mortgage creates no exemption of the property of the company from the operation of liens or claims created by the company's own acts, or resulting from judicial proceedings, the property acquired is subject to existing mortgages, and those who advance money or sell on credit to the directors are bound to take notice of claims which will arise under such mortgages. Coe v. Columbus, etc., R.R. Co., 10 Ohio St. 372.

A mortgage by a consolidated railroad company of the consolidated property will be paramount to the unsecured indebtedness of the several companies. Tyson v. Wabash R.R. Co., 11 Biss. 510. See Matter of Vt. & Canada R.R. Co., 17 Fed. Rep. 753.

pany to borrow such sum as should appear to the board of directors to be proper and necessary; and to secure the amount so borrowed, with interest, the company was authorized to pledge or hypothecate, by way of mortgage, trust, or otherwise, the Morris Canal, with all of its privileges, appendages, and appurtenances, and all the property and chartered rights of the company. It was under this latter act that the loan was made on which a controversy arose upon an attempt on the part of the trustee of the lenders to foreclose the mortgage given to secure the loan. It was held that as the acts authorizing the borrowing of money were not passed until after the act authorizing the extension of the canal, the latter act clearly contemplated a mortgage on the entire canal with its appendages and chartered rights; though if the mortgage given by the company had been a common law mortgage, it might perhaps have been true that the only redress of the complainant would have been by sequestration of the tolls, rents, and profits; that the complainant was therefore entitled to a decree for a sale of the entire canal, with its feeders, docks, and appendages, and, in case the sale should bring more than sufficient to satisfy his demand, other parties holding subsequent liens were to be paid in the order of their priority.¹

§ 238. Character of rolling stock.—The question whether rolling stock is to be regarded as personal or real property

¹ Willink v. Morris Canal, etc., Co.,
3 Green's Ch. N. J. 377. A mortgage
of all of the shares of a corporation is
not a mortgage of the realty of the cor-
poration; nor is a mortgage purporting
to convey the realty of the corporation
which is signed by the stockholders as
individuals, a mortgage of the corpora-
tion. The title to the land is in the
corporation, not in the individual stock-
holders. Wheelock v. Moulton, 15 Vt.
519; Isham v. Bennington Iron Co.,

19 Id. 230. A mortgage purporting to
convey the real estate of a corporation
must be executed in conformity with
the statute in relation to conveyances
by such corporations, or it will not be
a valid lien against subsequent judg-
ment creditors. Such a mortgage
signed "A., Chairman B. C. Co.," is
not a valid deed of the corporation,
even though sealed with the corporate
seal. The mortgage must be that of the
principal, and sealed with its seal. Ibid.

has given rise to considerable discussion in the courts, and some differences of judicial opinion. In Farmers' Loan & Trust Co. v. Hendrickson¹ it was held that the rolling stock of a railroad was to be deemed fixtures or necessary incidents in a conveyance of the real estate, and as between mortgagees and judgment creditors, STRONG J., said : "If railroad cars were used in any other place than upon the lands belonging to the company, or for any other purpose than in the execution of its business, or were constructed in such shape and so extensively as to become objects of general trade, or were not a necessary part of the entire establishment, I might consider myself as compelled by the weight of authority to decide that as they are not physically annexed to what is usually denominated real estate, they must be deemed personal property ; but as each and all of these characteristics or incidents are wanting, the considerations which I have mentioned, or to which I have alluded, leading to an opposite conclusion, require us to determine that they are included as fixtures or necessary incidents in a conveyance of real estate. In thus deciding we shall unquestionably carry out the intention of the parties, as it could not have been the design of such parties,—certainly not of the mortgagees,—that the security should be diminished by the wear and tear of the machinery, and the inevitable accidents to which it is subjected. Possibly the substituted machinery might not be included in the mortgage if it should be deemed personal property, and few, if any, would be willing to loan their money upon such an uncertainty, but it would be otherwise if the additions should be considered as made to the real estate."

A contrary view was afterward taken in several cases in the same State,² which view may now be regarded as sustained by the weight of authority. In Hoyle v. Platts-

¹ 25 Barb. 484.

31 Barb. 590; Beardsley v. Ontario

² Stevens v. Buffalo, etc., R.R. Co., Bank, Ib. 619.

burgh, etc., R.R. Co.¹ the court said: "The track exists for the use of the cars, rather than the cars for the use of the track. There is no annexation, no immobility from weight, no localization in use. The only element on which an argument can be based to support the character of realty, is adaptation to use with and upon the track. Even in respect to this, were the same contrivances adopted by a tenant for use in his trade upon leased lands, his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for then unity of ownership in track and cars, and independence of roads of each other, seemed to render it possible to consider rolling stock part of the realty without introducing great inconvenience. At the present time independent companies exist owning no tracks, whose trains run through State after State on the railroad track of other companies. . . . It is impossible to deal with such property as a part of the realty, without introducing anomalies and uncertainties of the gravest character. . . . The want of the element of localization in use, is a controlling and conclusive reason why the character of realty should not be given to the rolling stock of a railroad." A railroad company was authorized by an act of the legislature to mortgage for the purpose of raising money any particular division of its road separately. To do this, the company divided its main road into two divisions, the Eastern and Western, and successively executed mortgages thereon, as follows: In 1854, on the Eastern division; in 1856, on the Western division; in 1857, on the Eastern division; and in 1858, on the whole road. The entire line was used continuously as one road. The controversy was as to how the rolling stock should be apportioned between the different mortgages. It was held that as it was competent for the

¹ 54 N. Y. 314; 47 Barb. 109.

company to assign certain stock to one division, and certain other stock to another division, when the road was divided for the purpose of mortgaging it, it could not be assumed as a fact that there was no such allotment of the rolling stock, but that the language of the mortgages must be looked to to see if any such intention was expressed, and if there was not, then obviously the mortgages were successive liens on the whole stock.¹

Rolling stock has not only been held in many of the States not to be a fixture, but in some of them it is expressly declared, either by constitutional provision or by statute, to be personal property.²

§ 239. Machinery.—The wheel or engine which furnishes the motive power of a factory, and all that part of the gearing and machinery which has special relation to the build-

¹ Minnesota Co. v. St. Paul Co., 2 Wall. 609. NELSON, J., dissenting, with whom CLIFFORD and FIELD, JJ., concurred, said: "We agree that the rolling stock upon this road is covered by the several mortgages, and that as respects any other valid liens upon the same, it is inseparably connected with the road; in other words, is, in technical language, a fixture to the road so far as in its nature and use it can be called a fixture. But it is a fixture extending over the entire track of the road. It is not a fixture upon any particular division or portion, but attaches to every part and portion. It was purchased, for aught that appears, by the common funds of the old company, and which were derived from its various resources; and the mortgages or other incumbrances on the road made by the old company, whether on a portion or on the whole line, take effect according to the priority of the lien. These liens, so far as respects the rolling or moving stock, attach to them a right to have the cars run upon the road upon its

entire line, as the value of the lien depends upon this use of the property." See State v. Northern, etc., R.R. Co., 18 Md. 193; Coe v. State, 25 Ind. 177.

² See Boston, etc., R.R. Co. v. Gilmore, 37 N. H. 410; Coe v. Columbus, etc., R.R. Co., 10 Ohio St. 372; Hill v. Lacrosse, etc., R.R. Co., 16 Wis. 214; Chicago, etc., R.R. Co. v. Borough of Fort Howard, 21 Id. 44; Pacific R.R. Co. v. Cass Co., 53 Mo. 17; Ammant v. New Alexandria, etc., R.R. Co., 13 Serg. & Rawle, 210; Covey v. Pittsburgh, etc., R.R. Co., 3 Phila. 173; Miller v. Rutland, etc., R.R. Co., 36 Vt. 452; Williamson v. N. J. Southern R.R. Co., 29 N. J. Eq. 311, reversing S. C. 28 Id. 277; Hoyle v. Plattsburgh, etc., R.R. Co., 54 N. Y. 314; Pullan v. Cincinnati, etc., R.R. Co., 4 Biss. 34. In some of the earlier cases in Illinois, rolling stock was held to be part of the realty. Palmer v. Forbes, 23 Ill. 301; Hunt v. Bullock, Ib. 320; Titus v. Mabee, 25 Ill. 257; Titus v. Ginheimer, 27 Id. 462.

ing with which it is connected, belongs to the freehold; while an independent machine, like a loom, which if removed still remains a loom, retains its character of personality, and if mortgaged without an actual change of possession, the mortgage must be filed as a chattel mortgage.¹

§ 240. Mortgage of after-acquired property.—A mortgage by a railroad company of all of its present and future-acquired property, including the road, rolling stock, and all of the other property, is valid, and embraces as well rolling stock and other personal property afterward ordered, manufactured, and delivered, as that which is in the possession of the company at the time of the execution of the mortgage. While it is a legal maxim that a person cannot grant a thing he does not have, the principle has no application to a case of this kind. Such a mortgage does not undertake to grant *in presenti* property of the company not belonging to it, or not in existence at that date, but distinguishes between present property and that to be acquired afterward. A grant or conveyance may take effect upon property when it is brought into existence, and belongs to the grantor, in fulfilment of an express agreement, founded on a valuable consideration, if no rule of law is infringed, or rights of a third party prejudiced.

As to the claim of judgment creditors, the mortgage being a valid and effective security for bondholders of a prior date, they have a superior equity. If the mortgage has become forfeited, and the property embraced in it constitutes a fund more than sufficient to pay the bonds, the court may compel a foreclosure and satisfaction of the bonded indebtedness, so as to enable judgment creditors to reach the surplus; or the court may, upon an unreasonable resistance to the claim of execution creditors, permit a sale of rolling stock sufficient to satisfy the judgments.²

¹ Mendock v. Gifford, 18 N. Y. 28. Galveston R.R. Co. v. Cowdrey, 11

² Pennock v. Coe, 23 How. 117; Wall. 459; Shaw v. Bill, 95 U.S. 10. A

Sales or mortgages of after-acquired personal property have been sustained, when within the following rules : 1st. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, is the present value. 2d. The vendor or mortgagor must have a present actual interest in it or concerning it. There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected as necessary for its use, or as incident to it ; constituting a tangible existing basis for the contract.¹ In this case, a railroad company issued to a contractor, who was to build and equip the road, its bonds, secured by a mortgage on all of its real and personal property, as the same had

railroad bought by another railroad company is embraced in a mortgage given by the latter of all of its line completed and to be completed. Branch v. Jessup, 106 U.S. 468, aff'd 3 Woods, 481. A mortgage of all subsequently acquired property embraces a railroad afterward leased by the mortgagor. Barnard v. Norwich, etc., R.R. Co., 14 Bankr. Reg. 469. But real estate subsequently acquired by a railroad company not connected with the road, is not embraced in a general mortgage of the railroad—Calhoun v. Memphis, etc., R.R. Co., 2 Flippin, 442 ; 9 Cent. L. J. 66 ; nor rolling stock owned by a third person, and placed on a railroad under a contract with the company. Hardesty v. Pyle, 15 Fed. Rep. 778. Municipal bonds issued to aid in the construction of a railroad are not included in a mortgage given by the company of its then and thereafter to be acquired property, such bonds not being included in the specific description of the property mortgaged. Smith

v. McCullough, 104 U.S. 25. A mortgage by a railroad company of "income, earnings, and moneys," embraces prospective income only. Dow v. Memphis & Little Rock R.R. Co., 20 Fed. Rep. 768. All of the bondholders have a common interest in the mortgage security, all are equally entitled to the benefit of it, and, in case of a deficiency of the fund to satisfy the whole of the debt, they are entitled to a distribution *pro rata*. To permit one of the bondholders to proceed at law in the collection of his debt, would not only disturb the *pro rata* distribution in case of deficiency, and give him an inequitable preference over his associates, but also, if he were a bondholder under a second mortgage, prejudice the superior equity of bondholders under the first mortgage.

¹ Morrill v. Noyes, 56 Me. 456. See Benjamin v. Elmira, etc., R.R. Co., 49 Barb. 441 ; Coe v. Peacock, 14 Ohio St. 187 ; Phillips v. Winslow, 18 B. Mon. 431 ; Jessup v. Bridge, 11 Iowa, 572.

been or might be purchased by the company. The company afterward gave its mortgage on rolling stock which had been acquired by the company a long time after the execution of the construction mortgage. The court, with reference to the original mortgage, said, that the subject matter of the contract was sufficiently definite and certain, its subsequent existence reasonably sure, and the mortgagors had an existing interest in and title to the property then mortgaged, of which the rolling stock was to be an essential part necessary for the use to be added to it for the purpose of completing the work; that the construction mortgage created a valid lien upon the engines and cars as they were purchased and placed on the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage were entitled to have the trust enforced not only as against the railroad, but also against the rolling stock subsequently acquired.

It has been held that a mortgage by a railroad company of "all the road, property, rights, liberties, privileges, corporate franchises, incomes, tolls, and receipts, now held or hereafter to be acquired," executed under an act of the legislature authorizing the company to borrow money for constructing and equipping its road, to issue bonds therefor and to mortgage all or any part of the property, is effectual to give a valid lien on the rolling stock, furniture of stations, tools, and materials for the maintenance and repair of the road, whether owned by the company at the date of the mortgage, or afterward acquired by the company. The court said: "The act authorized the company to mortgage all its property—and property is whatever is a man's own, his future acquisitions, though subject to a contingency—because they can be enjoyed or used by anticipation. The legislature evidently intended this. The very object of the loan, and of the mortgage to secure it, as expressed in the act, was for the purpose of constructing

and equipping the road. It evidently contemplated a condition of things in the future. Had the road even been fully equipped at the date of the mortgage, it cannot be doubted that the legislature meant that it should comprise everything subsequently acquired to replace the old, worn-out materials and to maintain and keep up the equipment. No money would have been loaned on a security daily deteriorating and which must eventually perish entirely.”¹

The Plymouth and Concord Railroad Company executed to the complainants sundry mortgages of personal prop-

¹ Phila., etc., R.R. Co. v. Woelpper, 64 Pa. St. 366. See Covey v. Pittsburgh, etc., R.R. Co., 3 Phila. 173. Although after-acquired real estate of a railroad company required for the construction and maintenance of the railroad and the stations and other accommodations necessary to effect the objects of the company, pass to trustees under a mortgage of the railroad “constructed and to be constructed” as against the lien of a subsequent judgment creditor, yet land acquired by the company after the execution of the mortgage not thus used or employed for railroad purposes would not come within the description of the mortgage. Seymour v. Canandaigua, etc., R.R. Co., 25 Barb. 284. C. was employed by a railroad company to negotiate for a right of way for a part of its road. By his instruction L., one of the directors of the company, was, without L.’s knowledge at the time, and without any authority from the company, named as grantee of the real estate in question, which was paid for by C. with funds the company furnished him for its use and benefit. Previous to such purchase by C., the company had executed and delivered its mortgage on all the land then owned by it, or that might be owned or belong to it thereafter.

Subsequent to the purchase by C. the company executed a second mortgage similar in terms to the first mortgage, and a large amount of the bonds secured by the second mortgage were held by L. Default having been made in payments falling due under the first mortgage, judgment in a foreclosure suit was obtained in behalf of the bondholders, and the property being sold, passed by mesne conveyances to the plaintiffs. It was held that L. was a trustee in a resulting trust for the benefit of the company; that the company upon the execution of the deeds in which L. was named as the grantee was seized of a legal estate in fee in the land described in the deeds, which became *eo instanti* upon the execution of the deeds subject to the lien and operation of the first mortgage; that, as the conveyance to L. had been recorded, it was a cloud upon the title which the plaintiffs had a right to have removed; and that, as the prior lien of the first mortgage had been perfected by the foreclosure and sale of the premises to the plaintiffs’ grantor, the plaintiffs’ title was discharged from all indebtedness of the mortgagors arising after the execution of the first mortgage. Buffalo, etc., R.R. Co. v. Lampson, 47 Barb. 533.

erty. In 1850 the legislature of the State passed an act authorizing the company to issue certain bonds. The act provided that when the bonds were ready to be issued the company might secure the holders of them by a mortgage of the whole, or of a part of its real or personal property executed to three trustees, with power to the trustees, upon such terms and conditions as might be inserted in the mortgage, upon the non-payment of any one or more of the bonds or accrued interest, to sell the property, real or personal, and all the corporate rights, franchises, and privileges, or any part of the property, and convey the same to the purchasers. A subsequent section of the act provided that the deeds of the trustees, duly executed according to the provisions of the mortgage, should transfer and convey to purchasers all of the real and personal estate named in the mortgage, and that purchasers should thereby acquire all the rights, franchises, powers, and privileges which the corporation possessed, and the use of the railroad with all of its property and rights of property for the same purposes and to the same extent as the company could have used the same if said deeds had not been made. Of the mortgages given to the complainants, two were executed and delivered to them before the act of 1850, while the remainder were given to them subsequent to the issuing of the bonds and the mortgage to the trustees. One of the latter, which was made to secure the payment of two notes, conveyed to the complainants all the right, title, and interest of the company to certain railroad iron imported by the company, subject to the lien of the United States for duties. It was stipulated in this mortgage that the complainants might pay the duties on the iron and have a lien therefor as well as for the notes; that the company might use the iron in laying its track, and that, in case the notes were not paid at maturity or the duties refunded, the complainants might enter upon the land and premises of the

company, take up and sell the iron, and apply the proceeds to the payment of the notes and duties. The trustees being about to sell under their power, the complainants filed a bill in equity praying that the trustees might be decreed to pay the complainants the indebtedness secured by their mortgage before they sold the property, or that, if allowed to proceed with the sale, they might be decreed to pay out of the proceeds the indebtedness secured by the complainants' mortgage. It was held that the two mortgages made to the complainants before the mortgage to the trustees were valid to hold the personal property specifically described in them, but that the complainants must assert their security by taking possession of and removing the property, as in the case of a mortgage made by an individual. As to the claim of the complainants under mortgages made after the date of the mortgage to the trustees, the question was whether the latter mortgage covered after-acquired personal property. The condition of this mortgage having been broken, the property had been delivered to the trustees under an agreement that it should be used in operating the road and a compensation be paid for the use of it. It was held that even where the strict rule against the mortgaging of subsequently acquired property is enforced, if the mortgage purport to convey such property, and the mortgagee take possession with the assent of the mortgagor before another title attaches, he will hold from time to time, not as mortgagee, but as pawnee under the contract contained in the mortgage; but that, apart from this, the question whether the trustees could hold subsequently acquired property against the claim of the complainants, depended upon the construction of the act and of the mortgage made under it; that if the directors of the company made a mortgage purporting to convey to the trustees "all the property and all the rights," etc., it would convey to the mortgagees all the right and power which

the company had to acquire and hold property, and subsequently acquired property would pass under the mortgage and be vested in the trustees, such property becoming immediately upon its vesting in the company a part of the thing originally mortgaged and of the security. In the case of the iron imported, it belonged to the company subject to the lien of the United States for duties; that the mortgage to the trustees upon the principle stated would cover the iron subject to that lien; that the mortgage subsequently made to the complainants, so far as it went to secure other debts besides the sum afterward advanced to discharge the lien, must be postponed to the claim of the bondholders; that if the government voluntarily gave up possession of the iron, its lien would be gone, at least as to third persons; that if, by the agreement, the complainants were to pay the duties and retain possession of the iron until the money so advanced by them was repaid by the company, their lien might be good while they retained possession, because the mortgage to the trustees gave them no more than the company had, which was a right to the iron, subject to the lien for duties; that when the complainants allowed the iron to go into the possession and control of the general owners and to be applied to their use, the lien of the complainants was gone; but that though the company could make no bargain respecting the iron which would bind the trustees without their assent, yet if the trustees had notice of the agreement and assented to it, the complainants were entitled to take up the iron from the road-bed and remove it, if the money advanced for the duties was not repaid within the time limited.¹

A railroad company executed mortgages which covered all of the company's property, including such as might afterward be acquired. Subsequently the company pur-

¹ *Pierce v. Emery*, 32 N. H. 484.

chased locomotives and cars, giving the vendor its bond for the purchase money, in which it was stipulated that he should have a lien therefor on the property sold, and that the company would not sell or part with it until payment of the price without his written consent. It was held that a mortgage intended to embrace after-acquired property could only attach itself to such property in the condition in which it came into the mortgagor's hands ; that the conveyance of the property, and the mortgage for the purchase money, were to be regarded as one transaction, and no general lien, whether in the shape of a general mortgage, or judgment, or recognizance, could displace the mortgage for the purchase money, although it was not recorded ; that if the property sold had been rails, or any other material that became a part of, and was affixed to, the principal thing, the result would have been different ; but that being loose property susceptible of separate ownership and separate liens, such liens, if binding on the railroad company, were unaffected by a prior general mortgage given by it.¹

¹ U. S. v. New Orleans R.R. Co., 12 Wall. 362. A railroad company, to secure its bonds, executed four mortgages, the first three upon its railroad constructed and to be constructed, and its privileges, rights, and real estate, owned, or that should thereafter be owned by the company, and all tolls, issues, and profits. The terms of these instruments were, that if the company should be in default for the space of three months in the payment of either principal or interest, the trustees, on request in writing by any holder of the bonds, might take possession of the railroad, and all the property mortgaged, and, on notice, sell the same to pay the principal and interest due. The fourth mortgage, which was given to a trustee for one P., embraced the same property ; and it was agreed in a sep-

arate article that P. should have a special lien on a lot of railroad iron pledged to him and used in completing the track a distance of about five miles. Subsequent to the execution and delivery of these four mortgages, the roadbed, track, franchises, chartered rights and privileges, and rolling stock of the company, were sold by the sheriff under executions issued on judgments against the company to one T. and his associates, who acted under a new company organization termed the "Successor Company." The new organization took possession of the railroad, its works and property, and began to operate it. The last directors of the old company were interested in this purchase, and continued in the new company. There were also organized two other companies the members of which

A railroad company mortgaged its road, right of way, superstructure, etc., then belonging to the company or thereafter acquired. At that time the road was constructed in fact over the land of the plaintiff, but the company had not acquired a right of way. Shortly after the execution

were members of the "Successor Company," and their several interests proportionally the same in each concern. These made bargains with themselves whereby the income of the "Successor Company" was virtually absorbed by the other two. It was admitted that the outside companies were formed because they apprehended difficulty from the creditors of the old company. All of the mortgages were in the form prescribed by the charter, but they were executed in the city of New York, where the company had an office, and where its fiscal arrangements chiefly originated and were carried out. A bill in equity alleging the insolvency of the original company, was filed for a foreclosure of the mortgages, with a cross-bill by P. It was held that the mortgages were valid and binding; that the corporation could not repudiate a mortgage given to secure its bonds on the ground that its directors authorized its execution by a resolution passed outside of the limits of the State, the mortgage being in other respects executed and recorded in due form of law; that while it was generally true that a corporation existed only within the territory of the jurisdiction that created it, yet it was well settled that it might by its agents make contracts and transact business in another territory and sue and be sued there, and there was no reason why it should not be estopped by the action of its directors in another territory when such action was the basis of negotiations by which third parties had *bona fide* parted with their money, and the company received the

benefit of the transaction; that as to the question of the mortgages extending to after-acquired property, had there been but one deed of trust, and had that been given before a shovel had been put into the ground toward constructing the railroad, yet if it assumed to mortgage the road the company was authorized to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property as they came into existence would become instantly attached to and covered by the deed; that no agreement in P.'s fourth mortgage could give him precedence by reason of a superior equity over the prior mortgages; that the rails put down on the company's road became a part of it, and P., by allowing his property to go into and become part of the road, consented to its being covered by the mortgages in question; that the rule in maritime cases which gives priority to the last creditor for aiding to conserve the thing, did not apply to railroads; that the sale by the sheriff under an execution, did not nullify and destroy the prior mortgages; and that as the mortgage provided in what manner the trustees should take possession of the property and collect the tolls, incomes, and profits, until a regular demand was made, the purchasers of the road were not bound to account therefor, and it mattered not what bargains the defendants made between themselves as to the disposition of the tolls and income. Galveston R.R. Co. v. Cowdrey, 11 Wall. 459.

of the mortgage the plaintiff sold and conveyed to the company a strip five rods wide across his land. The mortgage was subsequently foreclosed, and the purchasers at the sale sold and conveyed their interest to another railroad company. The consideration for plaintiff's deed never having been paid, he brought an action to enforce a vendor's lien, making both of the railroad companies parties defendants. The court said: "True, the title to those premises was not in the company when the mortgage was executed; but it is perfectly clear that it was the intention of the parties that the mortgage should become a lien upon any right or interest in real estate subsequently acquired for a right of way, or necessary for the use of the road. As the mortgage purports to convey as well the real and personal property belonging to the company at the time of the execution of the mortgage and therein described, as all real and personal property subsequently acquired for the use of the road, it is manifest that when the company subsequently acquired an interest in the premises, from that moment the mortgage became a lien and charge upon them. A foreclosure sale was had of all the property, corporate rights, and franchises embraced in the mortgage, and it would be a violation of all principle, after the foreclosure sale, to enforce a vendor's lien."¹

¹ Pierce v. Milwaukee, etc., R.R. Co., 24 Wis. 551. If the plaintiff had taken a purchase-money mortgage, his claim might have been sustained. See Western Pa. R.R. Co. v. Johnston, 59 Pa. St. 290. The city of Bath, under an act of the legislature loaned its credit to a railroad company to build an extension of its road, taking as security a mortgage of the extension, and of all of the property of the extension which the company then had or might afterward acquire, and the franchise, and also embracing the original road of the company, and its property, including

the franchise. Subsequent to the execution of this mortgage the company purchased for the purpose of operating its road, quantities of wood, paying therefor from the income and earnings of the entire road, and depositing the wood at various places along the line of the road. Suits having been brought against the company by its creditors defendant, a deputy sheriff attached the wood, which was replevined by the mortgagees, delivered to the company, and consumed on the engines of the road. Subsequent to these proceedings the mortgagees took posses-

§ 241. Fraud in sale under mortgage.—If fraud in the sale be imputable to the corporation, its officers, or agents, it can take no advantage of the fraud, or retain any benefits which may thereby have accrued to it, without the consent

sion of the entire road for default in the payment of the loan, and afterward the creditors obtained judgments in their suits, and issued executions thereon. The court said: "With respect to after-acquired property, such only as should belong exclusively to the new portion of the road was attempted to be conveyed by the mortgage. The same is true of the earnings. The road was bought with the joint earnings of the whole road, and cannot therefore be regarded as the property of the extension, and the plaintiffs fail to establish a lien to it by virtue of their mortgage. When the complainants attempted to perfect their inchoate rights by taking possession of the property, they took it *cum onere*. Vested rights, valid attachments, would not be thereby destroyed. If the complainants ever had a lien on the wood, it is very clear that they have waived it. All the wood was consumed by the railroad company with the knowledge and consent of the plaintiffs themselves. The lien was necessarily lost when the wood ceased to exist. A party tortiously deprived of his lien by a destruction of the property would undoubtedly have a remedy against the wrong-doer. But when the property has been destroyed with his consent, he not only loses his lien, but he has no just ground of complaint." City of Bath v. Miller, 53 Me. 308. Plaintiffs were trustees in a mortgage given by a railroad company of the entire road, locomotives, cars of all descriptions, and all additions that might afterward be made. In an action of replevin for thirteen cars which had been attached while in the possession

of the company by the defendant as United States marshal, in an action of debt upon certain of the bonds of the company, it appeared that the cars were purchased by the company some years after the execution of the mortgage, and that twelve of them were attached in February and one in March. Plaintiffs made a demand in writing upon the defendant after the attachment in February, but not after that of March. It was held that as the property was not seized by the marshal for the purpose of being proceeded against in the courts of the United States either as goods alleged to be forfeited under the revenue laws, or as property that might be the subject of a libel *in rem*, or for any other liability upon which judgment could be rendered against the property seized, it was subject to process of replevin in the State courts; that as regarded the car attached in March, for all practical purposes the defendant had all the notice which the statute intended to give him, as the mortgage embraced the last car as well as those previously attached; and that the act of the legislature ratifying and confirming the mortgage, obviated all objection to the right to maintain the action on the ground that a mortgage would not pass personal property not in existence, or not owned by the mortgagor at the date of the mortgage, which in ordinary mortgages would have been fatal to the action. Howe v. Freeman, 14 Gray, 566. This case was reversed by the Supreme Court of the United States. With reference to conflicting processes between the Federal and State courts,

of the injured party. A railroad company gave its mortgage for two millions of dollars to secure the payment of its bonds in that amount. On default in the payment of the first instalment of interest the property was sold under the mortgage, the mortgagee acting as auctioneer, and bidding off the property himself as trustee for the bondholders, who soon after organized another railroad company. The notice of this sale set forth that the mortgage debt was two millions of dollars, and that seventy thousand dollars of interest were due. There was no evidence in the record tending to show that as much as \$200,000 of the bonds had been taken by *bona fide* holders. The remainder of the two millions of dollars were either held by the directors and not negotiated, or they were in their hands under fraudulent arrangements at nominal prices. On the hearing of a creditor's bill, it was held that the descriptive notice was calculated to destroy all competition among the bidders, and that the sale under it must be set aside as a fraud upon judgment creditors, and the mortgage remain as security for bonds in the hands of *bona fide* holders for value.¹

the question as to which authority shall for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the determination which jurisdiction first attached by the seizure and custody of the property under its process. 24 How. 450.

¹ James v. Railroad Co., 6 Wall. 752. A railroad company gave two mortgages, one on its road, and the other on its land grants, to secure certain bonds issued by it. The company failing to pay the interest on these bonds the trustee named in the mortgages sold the premises and franchise at auction, and bought in the property in trust for the bondholders, who thereupon organized a new com-

pany. But a prior mortgage still subsisted on a portion of the road, the trustees of which subsequently obtained a decree for their claim, which decree contained a proviso giving the new company, the complainant in this suit, the privilege of redeeming the property by satisfying the decree. Thereupon the complainant paid into court the amount named in the decree. When this payment was made a suit had been for some time pending in behalf of certain judgment creditors of the original company on a creditor's bill against the complainant, and a decree was finally rendered on the creditor's bill directing that the property should be resold, and the proceeds applied, after payment of prior liens, to the sat-

§ 242. Appointment of receiver.—A receiver will not be appointed as a matter of course under a mortgage upon default in payment. The appointment, when directed, is made for the benefit of all of the parties in interest, and is a matter resting in the sound discretion of the court ; the rule of courts of equity being not to displace a *bona fide* possessor from any of the just rights attached to his title unless there is some equitable ground for interference. If there is a hard and unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy at law.¹ The appointment of a receiver does not affect the priority of liens ; money or property in his hands being in the custody of the law, and retained by him for whoever is entitled to it. It has been held that if prior mortgagees do not take possession of the property, or adopt measures to foreclose, any subsequent incumbrancer may have a receiver appointed to receive and hold the rents and profits until those who have a prior right claim them in some proceeding ; but that a subsequent incumbrancer who has received rents and profits will not be compelled to refund to a prior in-

isfaction of the judgments on which the creditor's bill was founded. The complainant now asked to have its money restored to it, on the ground that it was paid under a mistake, the complainant supposing that it was removing an incumbrance from its own property, when it was in fact removing it from property decided to belong to other parties. It was held that the sale to the complainant being fraudulent and void as against creditors, when it was deprived of the possession of the property, it could not recover for incumbrances removed by it whilst in its possession ; that its purchase was void only as against the creditors of the original company, by satisfying whom it might have kept the property, and

its title would have been good ; that when it paid into court the money which it sought to recover back, it was paying off an incumbrance on its own property ; and that the fact that the board of directors of the complainant company was at the time of such payment wholly composed of persons who did not participate personally in the foreclosure of the mortgage, did not alter the case, since a corporation retains its identity through all the changes that take place in the individual membership. Railroad Co. v. Souter, 13 Wall. 517, FIELD, CHASE, and MILLER, JJ., dissenting.

¹ Williamson v. New Albany, etc., R.R. Co., 1 Biss. 198.

cumbrancer who afterward takes possession of the property or brings suit.¹

§ 243. Mechanic's lien.—Under the constitution and statutes of some of the States a lien is given to a mechanic or other person for labor done and materials, machinery, or fixtures furnished, in behalf of a corporation in the construction or repair of erections or improvements on the land of the corporation, giving the same remedy to secure payment for such labor done, or materials, machinery, or fixtures furnished as in the case of similar work done for private individuals.² The statute of Missouri,³ providing that persons who shall do any work or labor in constructing or improving the road-bed, etc., of any railroad company incorporated under the laws of the State, or owning or operating a railroad within the State, and persons who shall furnish ties, fuel, or bridges to such railroad company, shall have a lien upon the road-bed, station houses, depots, bridges, rolling stock, real estate, and improvements of such railroad, does not restrict the right to a lien to those who perform work on, or furnish materials for, the part of the road lying within the State, when part of a railroad lies in and part out of the State.⁴ In Maine, to give a lien on a mill under the statute⁵ for labor in altering the machinery, it must affirmatively appear that the machinery for which the labor was furnished was so connected with and attached to the building, so adapted to, and necessary for, the use for which it was erected, as to lead to the conclusion that it was intended to be permanently a part of it and of the realty. A single lien will not cover several distinct alterations in the same building, made at different times and independently of each other.⁶ A mechanic's lien

¹ Ohio & Miss. R.R. Co. v. Davis, 23 Ind. 553. See Connor v. Todd, 48 N. J. 361.

² Const. of Cal. of 1879, art. 22, sec. 1; comp. L. of Utah of 1874, p. 78, sec. 5.

³ Of March 21, 1873.

⁴ St. Louis Bridge, etc., Co. v. Memphis, etc., R.R. Co., 72 Mo. 664.

⁵ Rev. Sts. of Me., ch. 91, sec. 27.

⁶ Baker v. Fessenden, 71 Me. 292. See Allen v. Frumet Mining, etc., Co., 73 Mo. 688.

on a kiln for drying lumber does not include a saw-mill and planing-mill standing on the opposite side of the street from the kiln, although the steam derived from boilers located on a lot adjoining the mills is used in the kiln and furnishes power to the mills.¹ Neither swings nor seats are buildings or structures within the Code of California² for which a lien may be filed making a corporation liable.³ A house built for the use of a mine, and belonging to the mining property, is subject to a lien under the statute of Colorado.⁴ A superintendent of a mine is a laborer, and entitled to a lien on the mine under the mechanic's lien law of Utah.⁵

With reference to the priority of liens, it has been held in Maryland that when a mortgage is given by a corporation of its real estate, and improvements, and machinery thereon, the mechanic's lien on such improvements is subject to the prior incumbrance.⁶ The Code of Iowa provides that a mechanic's lien shall attach to the buildings, erections, or improvements for which they were furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and that any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.⁷

¹ McDonald v. Minneapolis Lumber Co., 28 Minn. 262.

Md. 179; McKim v. Mason, 3 Md. Ch. 186; Wells v. Canton Co., 3 Md. 234.

² Secs. 1183 and 1192.

⁷ Code of Iowa, sec. 2141. See

Lothian v. Wood, 55 Cal. 159. See Germania Building & Loan Assoc. v. Wagner, 61 Id. 349.

Neilson v. Iowa Eastern R.R. Co., 44 Iowa, 71; Davis v. Bilsland, 18 Wall. 659.

⁴ Keystone Mining Co. v. Gallagher, 5 Col. 23.

It has been held in Pennsylvania that a mechanic's lien against property essential to the operations of a public corporation is invalid.

Creditors may recover their debts by sequestering the earnings of the corporation, thus allowing it to proceed with its undertaking. Cullins v. Flagstaff Silver Mining Co., 2 Utah, 219. See Doane v. Clinton, Ib. 417; Parker v. Savage Placer Mining Co., 61 Cal. 348.

Foster v. Fowler, 60 Pa. St. 9

⁶ Denmead v. Bank of Baltimore, 9

CHAPTER XIV.

TAXATION OF CORPORATE PROPERTY.

<p>§ 244. Meaning and nature of taxes. 245. Power to impose taxes. 246. Right to tax foreign corporations. 247. Place of taxation. 248. Meaning of the term person or inhabitant in a statute. 249. State taxation with reference to the powers granted to the general government. 250. Taxation affecting commerce between the States. 251. Taxation of corporate franchise. 252. Assessment upon national bank shares. 253. Assessment upon property in general.</p>	<p>§ 254. Assessment in the case of banking corporations. 255. Assessment of railroad property. 256. Taxation must be equal. 257. Double taxation. 258. Right of State to exempt from taxes. 259. Construction of statutes exempting from taxation. 260. In case of consolidation. 261. In case of sale of corporate property. 262. Increase of taxation. 263. When exemption may be revoked.</p>
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§ 244. Meaning and nature of taxes.—A tax, from the Latin *taxo*, is a rate or sum imposed by government for public needs upon persons or property, according to a certain order and proportion. As ordinarily understood, it is confined to real and personal property and occupations; but, in a general sense, it embraces any contribution laid by government upon individuals or corporations for the use and service of the State, as toll, tribute, duty, excise, impost, custom, aid, or supply.¹ Sir EDWARD

27. In the same State, under the act of June 16, 1836, in the case of an insolvent corporation, the court may, upon petition, appoint a sequestrator of the property of the corporation, and a bill of discovery will lie at the instance

of a judgment creditor who is bound to pursue the remedy pointed out in the act through the sequestrator. Bevans v. Dingman's T. Co., 10 Pa. St. 174.

¹ Webster's Dict.; Burrill's L. Dict.; Bouvier's L. Dict.; Story on Const. 14;

COKE¹ says that "talliage" (the ancient word for taxes) includes all subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charges put or set upon any man. Theoretical writers have derived the right of the public to private property, to the extent that the use of it is needful and advantageous to the public, from the fact that property in its highest sense exists in the sovereignty of the State before any division is made among individuals, and that the right of resumption for common use is tacitly reserved by implied agreement. Practically, however, it is immaterial whether the right be supposed to have been impliedly reserved because it is a portion of the national sovereignty which is inalienable, or whether the right is created by the public necessity.²

The right of taxation and the right of eminent domain rest substantially on the same foundation, compensation being made when private property is taken in either way. Taxation takes money for public use, and the tax-payer receives, or is supposed to receive, just compensation in the protection which government affords to his life, liberty, and property, and in the increase in the value of his possessions by the use to which the government applies the money raised by the tax. With reference to the distinction between taxation and the taking of private property for public use, it has been said: "Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government

Cooley on Taxation, I. In *Bank of Ithaca v. King*, 12 Wend. 390, SAVAGE, Ch. J., defined a tax as a sum of money to be paid by the owners of property severally, yearly or otherwise, to compose a public fund for the purpose of defraying public expenses. See *U. S. v. Railroad Co.*, 17 Wall. 322;

Warren v. Henly, 31 Iowa, 31; *Hanson v. Vernon*, 27 Id. 31; *Santa Barbara v. Stearns*, 51 Cal. 499; *Railroad Co. v. Stockton*, 41 Id. 149; *Hilbush v. Catherman*, 64 Pa. St. 154.

¹ 2 Inst. 532.

² *Raleigh, etc., R.R. Co. v. Davis*, 2 Dev. & Batt. 451.

is a debtor for the property so taken ; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual without reference to the amount or value exacted from any other individual or class of individuals."¹ The power to take private property for public use acts on the property and not on the contract. A State could not resume a charter under the power of appropriation and carry on the functions of the corporation. A bank charter could not be thus taken and the business of the bank be continued for public purposes ; nor a bridge be taken by the State and kept up by it as a toll bridge. This would not be an appropriation of private property to public purposes. There would be no change in the use except the application of the profits, and this would not bring the act within the power. The property, not its product, must be applied to public use.² Requiring a license fee to be paid, is not a compulsory taking of private property, but a charge for the privilege of doing an act which the party assessed is not under any obligation to do, and the omission to do which will relieve him from the obligation to pay the charge.³

There is a distinction between taxes imposed for the general purposes of government, whether laid by the State directly, or through the various municipalities by which it exercises its powers, and impositions on property for improvements which, although demanded by public convenience and necessity, are undertaken for the special benefit of particular localities where the property claimed to be

¹ People v. Brooklyn, 4 Comst. 419, per RUGGLES, J. See Lichfield v. Vernon, 41 N. J. 123; Gilman v. Sheboygan, 2 Black. 510.

² West River Bridge Co. v. Dix, 6 How. 507.

³ Fire Dept. v. Noble, 3 E. D. Smith (N. Y.), 440.

exempt is situated, an equivalent or compensation being rendered by the enhanced value the property derives from the improvement. An exemption from taxation for the former, would not necessarily include the latter.¹ Thus an estate which was exempted from "all Parliamentary taxes," was held liable to a tax which, although imposed by the authority of Parliament, was not a tax for the benefit of the whole kingdom, but for the purpose of the local improvement of the district in which the plaintiff's estate was situated.² So a general law of the State exempting the property of religious corporations from taxation, was held not to embrace assessments for local improvements required for the public convenience, and which directly tended to enhance the value of the property in the vicinity.³ Where the charter of a hospital provided that it should be exempted from taxation of every kind, it was held that the exemption did not embrace a special assessment for the improvement of a street on which the hospital was situated.⁴ In the Matter of the Mayor, etc., of New York,⁵ the question arose under an act of the legislature which provided that no real estate belonging to any church or place of public worship should be taxed by any law of the State. The commissioners of the city, in widening and extending Nassau Street, made a report of the estimate and assessment of the damage and benefit to the parties interested, including certain churches. These churches objected to the report, on the ground, principally, that the word tax used in the act comprehended every species of contribution or burden imposed by the authority of the State. It was held that the provisions of the act referred to general pub-

¹ *Boston Seamen's Friend Soc. v. Mayor*, 5 Hun, 442. See *Lafayette v. Boston*, 116 Mass. 181. See *Worcester Agr. Soc. v. Worcester*, Ib. 189. ² *Male Orphan Asylum*, 4 La. Ann. 1.

³ *Bedford Union v. Commrs. of Bedford*, 7 Exch. 777. ⁴ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155.

⁵ *Harlem Presbyterian Church v. 11 Johns. 77.*

lic taxes, to be assessed and collected for the benefit of the town, county, or State at large; that the word "taxes" meant burdens, charges, or impositions, put or set upon persons or property for public uses; and that to pay for the opening of a street in proportion to the benefit or advantage derived from it, was not a burden or tax. The word public has no such fixed and settled meaning as necessarily to include town taxes within the phrase "public taxes," used in a charter. A town tax, in one view, seems to partake somewhat of the same character as a State tax, its purpose being to defray the expense of the town organization, and to enable it to perform its duties and discharge its obligations imposed upon it as a municipality constituting a part of the polity of the State. On the other hand, it differs from a State tax in its purpose, not being for the direct benefit of the people of the State at large, but local in its use and object, and affecting the property and people of a municipality.¹

§ 245. Power to impose taxes.—The power of taxation is an attribute of sovereignty essential to every independent government. The whole community is interested in retaining it unimpaired, and has a right to insist that its abandonment shall not be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.² The legislature of Rhode Island having

¹ Morgan v. Cree, 46 Vt. 773. It is a well-settled rule that every grant of the power of taxation to a municipal or other subordinate body must be strictly construed. Richmond v. Daniel, 14 Gratt. 387; Orange, etc., R.R. Co. v. Alexandria, 17 Id. 184; Virginia, etc., R.R. Co. v. Washington County, 30 Id. 474; Lynchburg v. Norfolk, etc., R.R. Co., 80 Id. 237.

² Bank of Pa. v. Com., 19 Pa. St. 144; Keesee v. Civil Dist. Board of Education, 6 Cold. Tenn. 127; Railroad Co.

v. Maryland, 34 Md. 344; 21 Wall. 456; Board of Directors v. Houston, 71 Ill. 318; Minot v. Phila., etc., R.R. Co., 18 Wall. 206; 2 Abb. U. S. 323. Blackstone, vol. 1st, p. 307, says: "As the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend to their private concerns, it is necessary that those individuals should be bound to contribute

granted to a bank a charter which was silent on the subject of taxation, a law was afterward passed taxing its capital, and payment of the tax was resisted as a violation of the charter. The court, in upholding the tax, said : " This power resides in government as part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. • However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature.¹ In *McCulloch v. State of Maryland*,² Chief Justice MARSHALL observed that " if we measure the power of taxation residing

a portion of their private gains in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies ; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject, who, when properly taxed, contributes only some part of his property in order to enjoy the rest." Adam Smith lays down the following rules : " 1st. The subjects of every State ought to contribute toward the support of the government as nearly as possible in proportion to their respective abilities ; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. 2d. The tax which each individual is bound to pay ought to be certain, and not arbitrary ; the time of payment, the manner of payment, and the quantity to be paid, ought to be clear and plain to the contributor and to every other person. 3d. Every tax ought to be

levied at the time, and in the manner, in which it is most likely to be convenient for the contributor to pay it. 4th. Every tax ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State." New Am. Cycl., tit. *Taxes*. Taxation is of ancient origin. It existed among the Hebrews in the time of the theocracy, and taxes were greatly increased during the later periods of Jewish history. The Roman emperors resorted to numerous devices of taxation. In the middle ages, direct and indirect taxes were levied by the republic of Venice. " It is only within the last one hundred years that the best methods of taxation have come to be understood, and the possibility of collecting such sums as are necessary for the maintenance of the government without impairing the prosperity of the people comprehended." *Ibid.*

¹ *Providence Bank v. Billings*, 4 Pet. 514. See *State v. Commercial Bank of Cincinnati*, 7 Ohio, 125; *Union Bank v. State*, 7 Yerg. Tenn. 490.

² 4 Wheat. 316.

in a State by the extent of sovereignty, which the people of a single State possess and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union."

The taxing power of a State exists independently of the Constitution of the United States ; and it may be exercised to an unlimited extent upon all property, trades, business, and avocations, existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government either expressly or by necessary implication.¹ "In respect to property, business, and persons within their respective limits, the power of taxation of the States remained, and remains, entire, notwithstanding the constitution. It is indeed a concurrent power, concurrent with that of the general government, and, in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred ; but with this qualification, it is absolute. The extent to which it shall be exercised, the subjects of it, and the mode of its exercise, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people, expressed in the State constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is

¹ Railroad Co. v. Peniston, 18 Wall. 5.

nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power within the limits of the constitution is complete in Congress."¹

There is no legal principle which prevents a State from imposing taxes according to its needs on every corporation enjoying franchises from the government, or passing through its territory, without regard to the residence or citizenship of the stockholders, unless restrained by some clear constitutional provision.² The doctrine laid down by the Supreme Court of the United States that lands sold by the government may be taxed before it has parted with the legal title by issuing a patent, is only applicable to cases

¹ *Lane County v. Oregon*, 7 Wall. 71. In the Delaware Railroad Tax Case, 18 Wall. 206, FIELD, J., remarked that "the exercise of the authority which every State possesses to tax its corporations, and all their property real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, cannot be regarded as conflicting with any constitutional power of Congress." Providing for the payment by a corporation of a specific sum in lieu of all other taxes, is not unconstitutional. *Daughdrill v. Ala. Life Ins. and Trust Co.*, 31 Ala. 91; *Farmers' Bank v. Com.*, 6 Bush. Ky. 127; nor the imposition of a penalty on a bank for failure to redeem its bills. *Brown v. Penobscot Bank*, 8 Mass. 445; *Harrisburg Bank v. Com.*, 26 Pa. St. 451.

² *Buffalo & Erie R.R. Co. v. Com.*, 3 Brewst. 386. "The same principle which enjoins upon the legislature the duty of providing convenient high-

ways for the people, and in furtherance of that end justifies the exercise of the right of eminent domain in behalf of a private railroad corporation, authorizes the imposition of taxes to aid in the construction of the road. If the use of the land taken is public, the purpose of the tax is also public, and for the same reason, inasmuch as they both spring from and are founded on the duty of the State to provide highways for the public convenience, and are both intended solely to promote that object. . . . The object of the legislature in permitting the land to be taken, is not to benefit the corporation, but to promote the construction of a highway, which it deems to be a work of public utility; and in like manner the purpose of the tax is, not to enrich the corporation, but to secure the construction of the road." *Stockton, etc., R.R. Co. v. City of Stockton*, 41 Cal. 147, per CROCKETT, J. See *Steubenville, etc., R.R. Co. v. Tuscarawas County*; 6 *Pittsburg Leg. J.* 68.

where the right to the patent is complete and the equitable title fully vested in the party without anything more to be paid, or any act done going to the foundation of his right. Where, therefore, everything had been done which was necessary in order to pass the title of land from the United States and the Indians to the purchaser, except the payment of the cost of selecting and surveying the land, and the payment of office fees to the register and receiver of the land office, it was held that no such title or estate had passed from the United States as would authorize the State of Kansas to tax the land.¹ An act of Congress provided that whenever in any grant of land made, or thereafter to be made, to railroads or other corporations, the United States had reserved the right to appoint commissioners to examine the roads, the costs, charges, and fees of such commissioners should be paid by the respective companies ; and that in case any company should refuse or neglect to make such payments, no more patents for lands should be issued to such company until the payments were made. A previous act of Congress passed to aid in the construction of a railroad provided for the appointment of commissioners to examine the road and report its condition to the President of the United States. In a suit brought by the company to enjoin the execution of a deed by the tax collector of lands granted to the company, it was not alleged in the pleadings that commissioners had been appointed, or that payment for the services of the commissioners had been made, when the lands were assessed or the taxes levied. It was held that as it did not appear that the plaintiff was entitled to a patent for the lands when they were assessed, they were not subject to taxation by the State.²

¹ Railway Co. v. Prescott, 16 Wall. of Commrs. v. Baldwin, 29 Kans. 603, overruling S. C. 9 Kans. 38, reported as Kansas Pacific R.R. Co. v. 538. ² Centr. Pacific R.R. Co. v. Howard, Culp.; Same v. Prescott. See Board 51 Cal. 229.

The right of taxation can only be lawfully exercised where the object is public, though the local public might be incidentally benefited by such aid extended to a strictly private enterprise. In *Loan Assoc. v. Topeka*,¹ in which it was held that a statute authorizing a town to issue its bonds in aid of the manufacturing projects of individuals was void, MILLER, J., in delivering the opinion of the Supreme Court of the United States, said : "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the object for which taxes have been customarily and by a long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is no such public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are

¹ 20 Wall. 655.

equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."¹

§ 246. Right to tax foreign corporations.—The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission.² It may wholly exclude foreign corporations from its territory, or permit them to transact business within its limits subject to the payment of a tax, license fee, etc., as a condition of granting the privilege, provided it does not embarrass or restrain the action of the national government or prevent or restrict the operation of any constitutional law of Congress.³

It is not merely the creation of corporate functions and privileges or the conferring of rights and franchises by the legislature which entitles the State to tax the possessor of

¹ See Jenkins v. Andover, 94 Mass. 74; Lowell v. Boston, 111 Id. 454; Curtis v. Whipple, 24 Wis. 350; Parkersburg v. Brown, 106 U. S. 487; Citizens' Savings Assoc. v. Topeka, 3 Dillon, 376; Briggs v. Johnson County, 4 Dillon, 148; Messenger v. Pa. R.R. Co., 36 N. J. 407; 37 Id. 531; Rogers Locomotive Works v. Erie R.R. Co., 20 N. J. Eq. 379.

² McCullough v. State of Maryland, 4 Wheat. 316; Weston v. City Council of Charleston, 2 Pet. 449.

³ Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, Ib. 566; Western Union Tel. Co. v. Lieb, 76 Ill. 172; Same v. Mayer, 28 Ohio St. 521; Home Ins. Co. v. Davis, 29 Mich. 238; Farmers', etc., Ins. Co. v. Harrah, 47 Ind. 236; Doyle v. Continental Ins. Co., 94 U. S. 535; Oliver

v. Liverpool, etc., Life Ins. Co., 100 Mass. 531; State v. Lathrop, 10 La. Ann. 402; State v. Fosdick, 21 Id. 434; Slaughter v. Ins. Co., 13 Gratt. 767; Tatem v. Wright, 23 N. J. (3 Zab.) 429; Insurance Co. v. Com., 5 Bush. Ky. 68; Lafayette Ins. Co. v. French, 18 How. 407; State v. Western Union Tel. Co., 73 Me. 518; Com. v. Gloucester Ferry Co., 98 Pa. St. 105; Com. v. Texas, etc., R.R. Co., Ib. 90. A State legislature may regulate insurance in the State, designate who may insure, prohibit agencies except upon a certain condition, impose as such condition the payment of an annual tax to a charitable institution, and authorize such institution to collect the same. Fire Dept. v. Noble, 3 E. D. Smith, 440.

such privileges and rights. The exercise of powers or privileges, and even of occupations, without especial powers or privileges, may be equally subjected to taxation under the constitutional authority to impose and levy reasonable duties and excises. A corporation which seeks by its agents to establish a domicile of business in a State other than that of its creation, must take that domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there.¹ As a State has a right to impose conditions upon the acquisition and exercise of corporate rights created by its own laws, it has a similar right with respect to foreign corporations; and as it can discriminate between its own corporations in prescribing the terms of their creation, so it can discriminate between its own and foreign corporations in prescribing the terms on which the latter may be permitted to exercise their corporate faculty and acquire rights within its territory. And even where by its constitution it cannot in the imposition of taxes discriminate between its own corporations and its own citizens, any restriction in this respect would not operate in favor of foreign corporations, against whom it may discriminate in favor either of its own corporations or citizens.²

The act of New York of February, 1855, which provided that "all persons and associations doing business in the State as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of the State, shall be assessed and taxed on all

¹ Atty. Genl. v. Bay State Mining Co., 99 Mass. 148. An assessment of stock is not illegal because of its value being determined by including land lying in another State. Am. Coal Co. v. County Commrs., 59 Md. 185.

² Com. v. Milton, 12 B. Mon. 212; Insurance Co. v. New Orleans, I Woods, 85. "It is a mere confusion

of ideas to put these foreign corporations on the same footing with corporations which are the creatures of State laws, from the simple fact of their being alike corporations. It is equally unsound to claim for them the personal and constitutional rights of the citizens of the several States throughout the Union." State v. Lathrop, *supra*.

sums invested in any manner in said business the same as if they were residents of the State, and said taxes shall be collected from the property of the firms, persons, and associations to which they severally belong," was held to include foreign corporations. SELDEN, J., remarked that "it was not uncommon, previous to the passage of the act, as the history of our legislation shows; for foreign corporations, particularly insurance companies, to establish agencies in the city of New York, and perhaps elsewhere in this State, for the transaction of their corporate business. These agencies were protected by our laws and carried on a profitable business in this State, and yet contributed nothing toward the expenses of government. They came in direct competition with domestic corporations, which were heavily taxed. It was certainly just and right that they or the corporations by which they were established should be made to contribute to some extent to the public burdens."¹ Where a foreign insurance company deposited with the comptroller or superintendent of the insurance department of the State pursuant to the statute securities consisting of bonds of the city of Buffalo for the benefit of such of the policy-holders as should be residents of the State, it was claimed in behalf of the company that this deposit was not a sum invested in its business, but withdrawn therefrom,—separated from the other assets of the company, constituting a special trust fund in the hands of the comptroller, not subject to the control of the company nor liable to the claims of its general creditors, but declared by law to be merely a security to its policy-holders residents in or citizens of the United States; and that, if invested in the business of the company, it was not invested in its business done in the State, inasmuch as it was a security for all of its policy-holders in the United States. It was held, however, that these securities so de-

¹ Parker Mills v. Commrs. of Taxes, 23 N. Y. 242.

posited formed the same kind of capital as that of a domestic corporation incorporated for a similar purpose, in which the capital is the security for those who deal with it, neither being actually invested in business and used for that purpose, but both forming the basis on which the business is transacted, and the security from which payment of claims is to be enforced, and that they were therefore subject to taxation.¹

A State cannot tax for the purpose of revenue a foreign corporation in a mode different in principle from that in which it can tax one of its own domestic corporations. Laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the State are mere police regulations designed to protect the citizens of the State in which they are enacted from loss or imposition. But a tax law having revenue for its object is based upon a different principle, which is the right of the government to take so much of the property of the person or corporation as the government may deem necessary for its public wants. The act of taking the property is therefore an acknowledgment of the legal status of the person or corporation whose property is taken; and it is inconsistent with legal principles to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time deny such legal existence for the purpose of denying it of its rights.²

§ 247. Place of taxation.—A corporation, like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties, or be subjected to a special jurisdiction.³ Where a bridge company was in-

¹ British Com. Life Ins. Co. v. Commrs. of Taxes, 1 Keyes, 303; s. c. 31 N. Y. 32. ² Erie R.R. Co. v. State, 31 N. J. 531. ³ Glaise v. South Carolina R.R. Co., 1 Strobh. 70.

corporated by the concurrent acts of two States, it was held that one-half of its capital and surplus was subject to taxation in each State.¹ Land occupied by a railroad corporation on the line of the road which passes through several counties is regarded as owned by the corporation as a resident of each town and county through which the road passes.² In Rhode Island the rails, sleepers, bridges, etc., and easements of a railroad corporation are real estate and subject to taxation in the town where they are situated.³ The real estate of a manufacturing company is to be taxed in the town where it is situated, and the shareholders for their stock in the towns where they reside.⁴ In Massachusetts, where the statute declared that all the real estate within the limits of each town was a proper subject of taxation, and no exception was made in favor of the real estate of banks, it was held that the real estate owned by them, including that used for a banking house, was taxable in the town

¹ *State v. Metz*, 32 N. J. 199. A State cannot lawfully tax the whole track and equipments, the gross earnings, or the entire capital stock of a railroad which is partly situated without its boundaries and is partly operated in another State. It can only rightfully tax that portion of the property of the road which lies within its jurisdiction, or the proportion of stock representing that part of the road. *State Treasurer v. Auditor Genl.*, 46 Mich. 224.

² *Buffalo, etc., R.R. Co. v. Supervisors, etc.*, 48 N. Y. 93. In Kentucky a county subscribed for stock in a railroad company, and imposed an *ad valorem* tax on all of the taxable property of the county, in order to raise the amount subscribed. The county court decided that so much of the road as lay in the county was subject to the levy thus imposed, and attempted to enforce payment by sale, whereupon

the owners of property obtained an injunction restraining the proceedings. The court which granted the injunction said: "The railroad from one end to the other is an entirety, and, as a whole, may be subject to taxation or coercive sale. To avoid the evils that would arise from fragmentary taxation or sales, the law treats a railroad and all its appurtenances as one entire thing not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for State revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs." *Applegate v. Ernest*, 3 Bush. Ky. 648.

³ *Providence & Worcester R.R. Co. v. Wright*, 2 R. I. 459.

⁴ *Salem Iron Factory Co. v. Inhabs. of Danvers*, 10 Mass. 514; *Amesbury Woolen, etc., Manf. Co.*, 17 Id. 461. See *Glass Co. v. City of Boston*, 4 Metc. 181.

where such real estate lay.¹ In Amesbury Nail Factory Co. v. Weed,² the right of a parish to tax the real estate of a manufacturing corporation was considered. It was held that such property was liable to assessment for parish purposes. The liability was placed on the ground that all real estate situated within the limits of a parish was subject to assessment for parish purposes in the same manner and to the same extent as for municipal purposes, unless in cases specially excepted by law; so that it extended to land of citizens of other States, and to foreigners without regard to their being members of any religious society, or even to their being Christians. An exception was created by the statute of 1823, ch. 106, sec. 3, which so far changed the old law as to exempt from local taxation the taxable real estate of persons who at the time might be members of any other religious society within the State; but it left all taxable real estate liable to local taxation which belonged to citizens of other States, or which did not belong to citizens of the State who were members of other religious societies.³ When the real estate occupied by a corporation is located partly in one town and partly in another, it will be liable to be taxed in the town where the principal office is situated.⁴

In New York, previous to the act of 1855, ch. 37, the only way of subjecting the property of foreign corporations to taxation was to assess it in the name of the agent or trustee in whose possession it was found. Since that act, it must be assessed to the corporation in the town or ward where the principal office or place for transacting its financial concerns is situated;⁵ and it was held that the residence

¹ Tremont Bank v. City of Boston, 1 N. J. 397. See People v. City of Oswego, 6 Thomp. & Cook, 673.
Cush. 142.

² 17 Mass. 53.

³ Goodell Manf. Co. v. Trask, 11 Pick. 514.

⁴ Warren Manf. Co. v. Warford, 37

N. J. 397. See People v. Bay State Shoe & Leather Co., 17 Hun, 204. See Pelton v. Northern Transp. Co., 37 Ohio St. 450; Baltimore v. Balt. City Pass. R.R. Co., 57 Md. 31.

of an individual banker doing business under the general banking law of the State, was, for the purposes of the taxation of his banking capital, in the town or ward specified as the location of his banking office in the certificate required by the statute.¹ The first section of the act of New York for the incorporation of companies to navigate the lakes, etc., provided that any five or more persons might form a company by making a certificate in writing and filing the same in the office of the clerk of the county in which the principal office for the management of the business of the company was situated, in which certificate they were required to state, among other things, the name of the city or town and county in which the principal office for managing the affairs of such company was to be situated. The certificate filed by the plaintiff pursuant to this act contained the following: "The principal office for managing the financial and other affairs of such company shall be located and situated at the village of Tonawanda in the town of Wheatfield, county of Niagara, which is hereby declared to be the village, town, and county where the principal office for managing the affairs of such company shall be situated." It was proved that the corporation, shortly after its organization, established, and had ever since maintained, an office in the village of Tonawanda, where the stock-book was kept, and where the directors held their monthly meetings, but at which very little other business was transacted. Only one clerk was employed at this office, at a salary of one hundred and fifty dollars per annum. It also appeared that the business of the corporation, consisting of the transportation of produce and other property upon the Western lakes and the Erie Canal, was very large; that twenty clerks were employed at the office of the company in Buffalo; that the president, secretary, and treasurer

¹ Miner v. Village of Fredonia, 27 N. Y. 155; Metcalf v. Messenger, 46 Barb. 325.

of the corporation resided there, and did their business chiefly at that office; that the business done there annually amounted to several hundred thousand dollars; that full books of account of the business of the corporation were kept there; that money received at places west of Buffalo, after paying necessary disbursements, were remitted to the office at Buffalo; that the corporation had a large number of offices both East and West, at all of which, except New York and Chicago, the business was much less than at Buffalo; but that more money was received at Chicago, and about twice as much at New York, as at Buffalo. It was also shown that the object of the corporation in locating its principal office at Tonawanda was to avoid taxation in Buffalo. It was held that the certificate filed pursuant to the statute was conclusive upon the question of location, it not being important that a corporation should be taxed where it did the greatest amount of its business, but that the place where it was liable to be taxed should be known.¹

A statute in relation to the assessment and collection of taxes provided that the personal property of a corporation should be taxed in the town in which such corporation had its principal place of business or exercised its corporate powers. It was held that this was where the governing power of the corporation was exerted—where those met in council who had a right to control its affairs and prescribe what policy the corporation should pursue, and not where the labor was performed in executing the requirements of the corporation in transacting its business.²

Where it was shown that a railroad company had its principal office in A., where its financial and other affairs were managed, and its transfer-book and books of account were kept; that the directors of the company held their regular meetings there; that the machine-shops were there,

¹ Western Transp. Co. v. Schen, 19 N. Y. 408.

² Middletown Ferry Co. v. Middletown, 40 Conn. 65.

and the rolling stock repaired there when out of order, and kept when not in actual use ; that the clerk and treasurer resided in A. ; and that the president, though he resided elsewhere, was usually there attending to the business of the company. It was held that the company must be considered, for the purposes of taxation, as having its residence or domicile in A., and that its rolling stock was to be deemed as belonging and liable to taxation there.¹

The legislature has power to determine what persons and property shall be reached by the exercise of the power of taxation, and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. But where there is no jurisdiction, either as to person or property, the imposition of a tax is *ultra vires* and void. In a suit for the recovery of taxes alleged to be due from a ferry company to the city of St. Louis, it appeared that the company had an office in Illinois ; that its minor officers, such as engineers and pilots, lived in Illinois, where its real estate, including a warehouse, was situated ; that the company also had an office in St. Louis ; that its president, vice-president, and other principal officers lived in that city, and there the ordinary business meetings of the directors were held, and the corporate seal kept ; that the boats, when not in actual use, were laid up by the Illinois shore, and were forbidden by an ordinance of the city of St. Louis regulating ferries and ferryboats to remain at the St. Louis wharf, or landing longer than ten minutes at a time ; and that a tax was paid upon the boats in Illinois. It was held that the ferryboats were not taxable under a law taxing boats within the city.² An oil company, in the course of its business, purchased a lot of staves in Indiana for ship-

¹ Orange & Alexandria R.R. Co. v. ² St. Louis v. Ferry Co., 11 Wall, Alexandria, 17 Gratt. 176. 423.

ment and exportation to its place of business in Ohio to be used in making barrels. These staves were piled near the track of a railroad in Indiana, so as to be convenient for loading on the cars, and were at that place awaiting an opportunity for shipment, when they were listed for taxation, and placed on the assessment roll of the county. It was not known how long the identical staves had been piled up as aforesaid, as the plaintiff had been constantly purchasing and shipping staves at that point for a year or more. It was held that the staves being in legal contemplation at the time they were assessed *in transitu* to Ohio, they had lost their *situs* as taxable property in Indiana, and were not subject to taxation in the latter State.¹ In a suit brought by manufacturers to enjoin the collection of a tax on certain personal property of the concern, it appeared that the plaintiffs were wholesale jobbers of goods in C., which were manufactured at J., and also of goods purchased in the eastern markets. The members of the firm all resided in C., except one, who resided in S., and it was contended that as the goods of the firm were all sold in C., and the books and accounts of the firm kept there, the assessment of the personal property at J. was void. It was held that the property of the firm in the hands of its agents at J. had its *situs* at J., and was liable to be assessed at that place.²

Shares of stock are incorporeal personal property, and as such are incapable of having any *situs* save at the domicile of the owner. In the eye of the law they have in themselves no locality. They accompany the owner, and he may dispose of them according to the law of his domicile. In the case of corporations which deal in money

¹ Standard Oil Co. v. Bachelor, 89 Ind. 1. See Powell v. City of Madison, 21 Id. 335; Rieman v. Shepard, 27 Id. 288; Carrier v. Gordon, 21 Ohio St. 605. Mohawk, etc., R.R. Co. v. Clute, 4 Paige Ch. 384; McHarg v. Eastman, 4 Robertson, N. Y. 635; People v. Commissioners, etc., 46 How. Pr. 315; Eastern Bridge Co. v. The County, 9 Pa. St. 415.

² Selz v. Cagwin, 104 Ill. 647. See Pa. St. 415.
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and securities like banks, the stockholders are the beneficial owners of all of the corporate property, and are taxed for it in the places where they reside; and consequently the personal property of such corporations is not liable to another tax assessed on the corporation in the locality where it is established and has its principal place of business.¹

In some cases where personal property is employed in manufactures and in trade, and in that respect assumes the character of real estate, the property is taxed in the place where it is so employed, the law following the same general policy which requires land to pay taxes in the place where it is situated.² In *Maltby v. The Reading & Columbia R.R. Co.*,³ the Supreme Court of Pennsylvania decided that bonds of corporations held by non-residents were taxable in that State, on the ground that such bonds were property in the State because secured on property there. The general rule that personal property, as to its *situs*, follows the domicile of the owner, is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former

¹ *National Bank v. Com.*, 9 Wall. Mass. 298; *Atty. Genl. v. Bay State Mining Co.*, 99 Id. 148.
353; Delaware R.R. Tax, 18 Id. 206; *North Ward Nat. Bank v. Newark*, 39 N. J. 380; *New Orleans, etc., R.R. Co. v. Board of Assessors*, 32 La. Ann. 19; *Bradly v. Bauder*, 36 Ohio St. 28; *Porter v. Rockford, etc., R.R. Co.*, 76 Ill. 561; *Quincy Bridge Co. v. Adams Co.*, 88 Id. 615; *State Bank v. Richmond*, 79 Va. 113; *Whitney v. Madison*, 23 Ind. 331; *Farrington v. Tennessee*, 95 U. S. 679; *Savings Bank v. Nashua*, 46 N. H. 389. See *Dyer v. Osborne*, 11 R. I. 321; *McKeen v. County of Northampton*, 49 Pa. St. 519; *Seward v. City of Rising Sun*, 79 Ind. 351; *Sumter Co. v. Nat. Bank*, 62 Ill. 464.

² 52 Pa. St. 140. "It is undoubtedly true," said the court in this case, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizens of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents. . . . There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere."

³ *Com. v. Hamilton Manf. Co.*, 94

State rather than an absolute principle in all cases. Like other laws of a State, it is subject to repeal, modification, or limitation; and where a statute provides that it shall not prevail in assessing the personal property of railroad companies, it simply exercises an ordinary function of legislation.¹

The national banking act,² by providing that the shares of national banks held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by a State, at the place where the bank is located, and not elsewhere, separates shares of stock in national banks from the person of their owner, and gives them a *situs* of their own. In such case the shares must be taxed at the place where the bank is located, without regard to

¹ State v. Railroad Tax Cases, 92 U. S. 575; Sturges v. Carter, 114 Id. 511; Webb v. Burlington, 28 Vt. 188; Lycoming County v. Gamble, 47 Pa. St. 106; Smith v. Exeter, 37 N. H. 556; Worth v. Commissioners, 82 N. C. 420; 90 Id. 409; San Francisco v. Fry, 63 Cal. 470; Holton v. Bangor, 23 Me. 264; State v. Hannibal, etc., R.R. Co., 37 Mo. 265; Jones v. Davis, 35 Ohio St. 474; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Baltimore v. Baltimore, etc., R.R. Co., 57 Md. 31; Howell v. Cassopolis, 35 Mich. 471; People v. Bradley, 39 Iowa, 130; People v. Home Ins. Co., 92 N. Y. 328; People v. New York, etc., Co., 92 Id. 487; St. Albans v. Nat. Car Co., 57 Vt. 68. See Laws of N. Y. of 1880, chs. 140, 596; of 1881, ch. 477; of 1882, ch. 410. The internal revenue act of June 30, 1864, did not include non-resident aliens, but was confined to residents of the United States and citizens residing abroad. The acts of Congress of March 10 and July 13, 1866, imposed a tax on alien non-resi-

dent bondholders. R.R. Co. v. Jackson, 7 Wall. 262. The capital of a State bank invested in foreign countries can be taxed by the United States under section 3408 of the revised statutes. In Nevada Bank v. Sedgwick, 104 U. S. 111, WAITE, C. J., said: "The Nevada Bank was incorporated and organized under the laws of one of the States of the Union, and it had its principal place of business within the United States. It was therefore subject to the sovereign power of the United States, and a proper subject of taxation. The investments abroad are still the property of the bank and part of its capital. In the absence of any averments to the contrary, we must presume they were such as banks usually make in doing a banking business, and that their legal *situs* was at the home office of the corporation. We need not consider, therefore, whether if they had been made in fixed property subject exclusively to another jurisdiction a different rule would apply."

² Sec. 5219.

the domicile of the owner.¹ The amendatory act of Congress of Feb. 10, 1868, ch. 7, provides that "The words 'place where the bank is located and not elsewhere,' shall be construed and held to mean the State within which the bank is located; and the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such State, and provided always that the shares of any national bank owned by non-residents of any State shall be taxed in the city or town where said bank is located, and not elsewhere." The foregoing, as respects shares belonging to non-resident stockholders, is apparently intended to annul the general rule that personal property follows the person, and has no locality other than the domicile of the owner, and to attach to such shares, for some purposes, and to some extent, the local character and fixity of real estate.²

§ 248. Meaning of the term person or inhabitant in a statute.

—Generally, under the designation "*persons*," employed in statutes providing for taxation, corporations are includ-

¹ Tappan v. Merchants' Nat. Bank, 19 Wall. 490; First Nat. Bank v. Smith, 65 Ill. 44; Baker v. First Nat. Bank, 67 Id. 297; Stetson v. City of Bangor, 56 Me. 274; Kyle v. Fayetteville, 75 N. C. 445; First Nat. Bank v. Douglas County, 5 Dillon, 330; Austin v. Boston, 96 Mass. 359; Flint v. Aldermen of Boston, 99 Id. 141; State v. Newark, 39 N. J. 380. See Union Nat. Bank v. Chicago, 3 Biss. 82; Howell v. Cassopolis, 35 Mich. 471; People v. Weaver, 100 U. S. 539; 14 Int. Rev. Rec. 77.

² Prov. Inst. for Savings v. Boston, 101 Mass. 575. See Murray v. Berkshire Life Ins. Co., 104 Mass. 586; Waite v. Dowley, 94 U. S. 527; Mintzer v. County of Montgomery, 54 Pa. St. 139; McLaughlin v. Chadwell, 7 Heisk. Tenn. 389; Clapp v. City of Burlington, 42 Vt. 579; Tenth Ward Nat. Bank v. Newark, 39 N. J. 380; Wesson v. First Nat. Bank, 8 North Eastern Reporter, 87; Adams v. Nashville, 95 U. S. 19; Cummings v. Merchants' Nat. Bank, 101 Id. 153; Evansville Bank v. Britton, 105 Id. 322; Supervisors v. Stanley, Ib. 305; City Nat. Bank v. Paducah, 2 Flippin, 61; First Nat. Bank v. Treasurer, 25 Fed. Rep. 749; *In re McMahon*, 102 N. Y. 176; Ruggles v. Fond du Lac, 53 Wis. 436.

ed, unless some special provision of law provides in the same case for the taxation of corporations under another form of assessment.¹ In *People v. Utica Ins. Co.*,² Chief Justice THOMPSON mentioned a case decided by the Supreme Court of New York, under the act of that State of 1813, in which a manufacturing company was held liable to be taxed for its property, though *persons* was the only term used. So, the term "*inhabitant*" includes a corporation occupying an office or building in a town, ward, or village, in conducting corporate business, for many purposes, and especially with reference to taxation for public purposes.³

§ 249. State taxation with reference to the powers granted to the general government.—The several States have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. In *McCulloch v. State*,⁴ it appeared that an act of Maryland made it penal for officers of any branch bank that might be established therein, without its authority, to issue notes of such bank to circulate as money except upon stamped paper to be furnished by the State, for which it charged a tax ; and the cashier of a branch of the Bank of the United States in Baltimore was prosecuted for issuing there the notes of this bank in violation of that law. It was held that as the bank was an agency through which the national government was executing its powers, the act of Maryland levying the tax was void. MARSHALL, Ch. J., said : "The power of taxation is one of vital importance. That it is retained by the States ; that it is not abridged by the grant of a similar

¹ *British Com. L. Ins. Co. v. Commissioners*, 1 Keyes, 303 ; *Miller v. Com.*, 27 Gratt. 110 ; *Railroad Tax Case*, 8 Sawyer, 238. See *Frankford, etc.*, R.R. Co. v. Phila., 58 Pa. St. 119.

² 15 Johns. 382.

³ *Ontario Bank v. Bunnell*, 10 Wend. 186.

⁴ 4 Wheat. 316.

power to the government of the Union ; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The States are expressly forbidden to lay any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded,—if it may restrain a State from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. . . . The people of a State give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all for the benefit of all, and upon theory should be subjected to that government only which belongs to all." It was held, however, that this principle did not extend to a tax paid by the real property of the Bank of the United States in common with the other real property in the State, nor to a tax imposed on the interest which citizens might hold in the bank in common with other property of the same description.¹

¹ See Osborn v. Bank of U. S., 9 Wheat. 738.

Congress may, in the exercise of powers incidental to its express powers, make or authorize contracts with individuals or corporations for services to the government; grant aid by money or land in preparation for, and in the performance of such services; make any stipulation and conditions in relation to such aid not contrary to the constitution, and exempt, in its discretion, the agencies employed in such services from any State taxation which will prevent or impede the performance of them. But there is a distinction between the means employed by the government, and the property of agents employed by it. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.¹ Exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as it was intended they should serve it, or hinders the efficient exercise of the power.² An individual is exempt from taxation on account of bonds issued by the United States in whatever form the taxation may take, whether upon the bonds *eo nomine*, or upon personal property generally in which the bonds are included, or upon a value equal to the amount of the bonds. The principle is that "the right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government."³ The exemption from taxation is not confined to the par value of

¹ Thompson v. Pacific R.R. Co., 9 Wall. 579. Dearing, 91 U. S. 29; Pollard v. State, 65 Ala. 628.

² Railroad Co. v. Peniston, 18 Wall. 5; Carthage v. First Nat. Bank, 71 Mo. 508; Farmers', etc., Nat. Bank v. City Council of Charleston, 2 Pet. 449. ³ MARSHALL, C. J., in Weston v. City Council of Charleston, 2 Pet. 449.

the bonds. The premium is a part of the entire value, and when that is taxed they are taxed, or, what is equally condemned, their value, or a part of their value, is taxed.¹

United States treasury notes issued under the acts of Congress, though intended to circulate as money, are obligations of the national government, and exempt from taxation. The foundation upon which the power of the government to exempt its treasury notes from taxation rests is, that the value of such notes depends upon the promise of the government to ultimately redeem them. They circulate as currency, not like gold and silver, by reason of their intrinsic value, but by virtue of the promise impressed upon them, and the faith given to that promise; in other words, upon the credit of the government. And therefore a tax upon the notes is simply a tax upon that which gives them value, the promise of the government,—a tax upon its credit. The national bank notes, issued by the national banking associations under authority of Congress, are also obligations of the national government, the only difference between them and the legal tender notes being, that the government is primarily liable for the latter, and secondarily liable for the former upon the failure or default of the national bank issuing the notes.²

The capital stock of a national bank invested in Federal securities cannot be taxed, nor can the corporation be taxed

¹ People v. Commrs. of Texas, 90 N. Y. 63, overruling People v. Manhattan Fire Ins. Co., 76 Id. 64. The act of Congress declaring that all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations, should be exempt from taxation by or under State authority, was only declaratory of the result of previous adjudication. State Mu. Life, etc., Co. v. Haight, 34 N. J. 128.

² Horne v. Green, 52 Miss. 452;

Board of Commrs. v. Elston, 32 Ind. 27. See Lilly v. Commrs. of Cumberland Co., 69 N. C. 300. Certificates of indebtedness issued by the United States secretary of the treasury, showing indebtedness of the government which has been audited and allowed, are liable to taxation by State authority. People v. Hoffman, 37 N. Y. 9. See U. S. v. Wilson, 106 U. S. 620. And the same was held as to legal tender notes. People v. Board of Supervisors, Ib. 21.

as the owner of such securities.¹ The same is true of its personal property and assets, such as safes, office furniture, and the like.² But the shareholders of a national bank may be taxed on their stock or shares, notwithstanding the capital is invested in Federal securities and the tax is collected from the bank, provided the rate of taxation does not exceed the rate imposed upon the banks of the State where such national bank is located.³ "National banks are pri-

¹ Bank of Commerce v. New York, 2 Black. 620; Bank Tax Case, 2 Wall. 200; Collins v. Chicago, 4 Biss. 472; Sumter County v. Nat. Bank of Gainesville, 62 Ala. 464. See New Orleans v. People's Bank, 27 La. Ann. 646. The capital stock of a bank may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in the bonds of the government, or in State bonds, or in bonds and mortgages, which then belong to the bank as a corporate entity, and not to the stockholders. A tax upon this capital is a tax upon the bank, which, when it is invested in the securities of the government, cannot be taxed. A State is not in terms prohibited from imposing a tax on the capital of national banks located therein; "but by expressly recognizing the right of State taxation against them upon their real estate only, and by providing for such tax against the shareholders of the banks upon the value of the shares they may respectively own, it seems to be implied that this is as far as a State may lawfully go in subjecting these associations to such burdens, and the only manner in which they can be imposed." It has been argued that "inasmuch as the capital is composed of the shares, and the shareholders constitute the corporation, a tax upon the capital, or all the shares of the capital in gross, against the corporation itself, is in legal effect

the same as a tax against the shareholders severally upon their respective shares. . . . Yet Congress, by providing that all the shares of the capital may be included in the valuation of the personal property of their owners or holders for State taxation, and by requiring to this end written or printed lists to be kept for inspection by the tax officers of the names, places of residence, and number of shares of these shareholders, appears carefully to have avoided subjecting the banks themselves to State taxation of their capital." Nat. Com. Bank of Mobile v. Mobile, 62 Ill. 284, per MANNING, J. The business of a national bank cannot be taxed by State authority. City of Macon v. First Nat. Bank, 59 Ga. 648. The Central Pacific Railroad Company is not exempt from State taxation on the ground that it was constructed in pursuance of acts of Congress, and employed by the national government for the transportation of the mails, the armies of the United States, munitions of war, etc. Huntington v. Cent. Pacific R.R. Co., 2 Sawyer C. C. 503.

² Nat. State Bank v. Young, 25 Iowa, 311.

³ Van Allen v. The Assessors, 3 Wall. 573; Nat. Bank v. Com., 9 Id. 353; Tappan v. Merchants' Nat. Bank, 19 Id. 490; St. Louis Nat. Bank v. Papin, Thomp. Nat. Bank Cas. 326; Collins v. Chicago, 4 Biss. 472; First

vate associations authorized by Congress for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium. They were intended to be to the nation what a well-regulated system of State banks was to the States respectively. In legal contemplation the property in the capital stock of a national bank is in the corporation *eo nomine*, which has the same right to control it within the powers conferred by its charter that a private individual has to deal with his own property. While such is the power of the corporation over the corporate property as a whole, the shareholders have each a separate and distinct interest therein. This interest consists in the right to participate in the profits according to the number of shares they may own respectively, and to a distributive share of the residue of the corporate property after the payment of its debts. A burden, therefore, imposed upon the corporation or its property *eo nomine*, affects the operations of the corporation; while a burden upon the shares affects the shareholders. The right to do the latter does not necessarily imply a right to do the former."¹ It is provided by the national banking act that "Nothing herein shall prevent all the shares in any association from being included in the valuation of the

Nat. Bank v. Douglass County, 3 Dillon, 330; Monroe County Savings Bank v. Rochester, 37 N. Y. 365; Mintzer v. County of Montgomery, 54 Pa. St. 139; Baker v. First Nat. Bank, 67 Ill. 297; Sumter County v. Nat. Bank, 62 Ala. 464; 34 Am. Rep. 30; Frederick County v. Frederick Farmers', etc., Bank, 48 Md. 117; St. Louis Building, etc., Assoc. v. Lightner, 47 Mo. 329; First Nat. Bank v. St. Joseph, 46 Mich. 526; Flint v. Board of Aldermen, 99 Mass. 141. The right of Congress to grant power to the States to impose a tax

upon shares in national banks cannot be impugned on the ground that it impairs the validity of the contract of the government exempting bonds upon which the circulation of the banks is based from taxation. Congress had the right to impose this condition as a royalty annexed to the grant of corporate power, and the corporators, by accepting the grant, assent to the condition. Frazer v. Seibern, 16 Ohio St. 614.

¹ Stetson v. City of Bangor, 56 Me. 274. See Nat. State Bank v. Young, 25 Iowa, 311.

personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located ; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein contained shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.”¹

The interest of the shareholder is like any other property that may belong to him, and it is this which is subject to taxation by the State under the limitations prescribed.² Every owner takes the shares subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. This money invested in the shares is withdrawn from taxation under the authority of the State in which he resides, and submitted to the taxing power of the State, where, in contemplation of the law, his investment is located. The State, therefore, in which a national bank is situated, has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.³ The act of Congress placing shares of stock in

¹ Act of Congress of June 3, 1864; ² Tappan v. Merchants' Nat. Bank, U. S. Rev. Sts., sec. 5219, p. 1015. ³ 19 Wall. 490; First Nat. Bank v.

Adams v. Nashville, 95 U. S. 19. Smith, 65 Ill. 44. Aff'd in Baker v.

national banks within the taxing powers of the States, seeks to protect corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power. It has reference to prospective legislation by the States, and its object is accomplished when the States conform, as far as practicable, their revenue systems to it. The shares of stock in national banks are not, therefore, entitled to immunity from taxation, because State banks, which were chartered a long time before the national banking law was passed, are exempt from municipal taxation.¹ A State, by exempting certain classes of taxable property partially or wholly from taxation, does not thereby adopt a rule of taxation which must be applied to national bank shares under the law of Congress.² Where State laws exempted all mortgages, judgments, recognizances, or moneys owing upon articles of agreement for the sale of real estate, it was held that such exemption did not preclude the State from taxing national bank shares to the same extent that moneyed capital other than that of the character exempted was taxed.³ But when an exemption or deduction is allowed by the laws of a State which is of such general operation as to affect all classes of taxable property, it must be allowed in assessing shares in national banks, because it necessarily is the rule of assessment.⁴ When the shares of a national bank are taxed by a State at their full value, without any allowance for the real estate of the bank, the banking office and lot owned and occupied by the bank as its place of business is not liable to assessment and taxation.⁵ On the other hand, when the shares

First Nat. Bank, 67 Id. 297; Kyle v. Fayetteville, 75 N. C. 445.

¹ City of Richmond v. Scott, 48 Ind. 568.

² Hepburn v. School Directors, 23 Wall. 485; People v. Commissioners, 4 Id. 244.

³ Gorgas' Appeal, 79 Pa. St. 149.

⁴ Nat. Alb. Exch. Bank v. Wells, 18 Blatchf. 478. See First Nat. Bank v. Waters, 19 Id. 242.

⁵ Commrs. of Rice County v. Citizens' Nat. Bank, 23 Minn. 280. See City Nat. Bank v. Paducah, Thomp. Nat. Bank Cas. 300; People v. Commrs. of Taxes, 67 N. Y. 516.

are assessed at their par value, without including an undivided surplus, such surplus, if not invested in United States securities, is liable to State taxation.¹ A law of a State providing that the cashier of every national bank of the State shall, under a penalty for neglect or refusal, transmit on or before a specified day in each year to the clerks of the towns in which any shareholder of the bank may reside, the names of such shareholders on the books of the bank, and also the sum actually paid in on each share on the first day of that month, may be a proper exercise of legislative power.²

The statute of a State requiring a national bank to pay taxes laid on the shares of its stock may be valid.³ To render a national bank liable for the payment of taxes due from its shareholders, it must be shown that the bank has or has had dividends or other money or property belonging to the delinquent shareholder. It may be made the duty of the bank to retain dividends or sufficient of them to pay the taxes. If it should appear that the bank has made no dividends, but might have done so, and instead placed its earnings and profits to its assets as surplus, such surplus might perhaps be deemed money, credits, assets, or personal property belonging to the shareholders, and under the control of the bank, and liable to that extent for taxes due from its shareholders.⁴ A statute of

¹ First Nat. Bank v. Peterborough, 56 N. H. 38; State v. Newark, 39 N. J. 380.

² Waite v. Dowley, 94 U. S. 527; Whitney v. Ragsdale, 33 Ind. 107.

³ Nat. Bank v. Com., 9 Wall. 353.

⁴ Hershire v. First Nat. Bank, 35 Iowa, 272. A statute of Ohio authorized a bank to pay the tax on the shares of its stockholders and deduct the same from dividends or from any funds of the stockholders in its hands or coming afterward to its possession, and it

forbade the bank to pay dividends on such stock or to transfer it or permit it to be transferred on its books so long as the tax remained unpaid. The Supreme Court of the United States held that a similar statute of Kentucky, which enabled the State to deal directly with the bank in relation to a tax on its shareholders, was valid, and authorized a judgment against a bank which refused to pay the tax, Nat. Bank v. Com., 9 Wall. 353. The statute of Kentucky declared that the

Connecticut required that each of the savings banks should annually pay to the treasurer of the State a sum equal to three-fourths of one per cent. on the total amount of deposits in such savings bank on the first day of July in each successive year. It was held that the bank was not entitled to a deduction from the deposits of such portion as was invested in United States securities, the tax being upon the bank, and not upon its property.¹

The imposition by a State upon insurance companies of a tax on all of their business, as shown by the entire premiums paid from all sources, is not an interference with any grant of Federal power on the ground that a portion of their receipts is drawn from sources outside of the State. It is not a tax laid on any property or article of commerce which can be imported or exported, but a tax on money or its representative,—on the results or avails of business,—that which belongs to the corporation itself, and not the property of others. It is not a tax on property in another State, but on money in the treasury of the corporation within the State.²

§ 250. Taxation affecting commerce between the States.—When the subjects over which a power to regulate

bank must pay the tax, while that of Ohio only said that it might. "But the Ohio statute, by the remedies it provides, places the bank in a condition where it must pay the tax or encounter other evils of a character which create a right to avoid them by instituting legal proceedings to ascertain the extent of its responsibilities before it does the acts demanded by the statute." *Cummings v. Nat. Bank*, 101 U. S. 153.

¹ *Coite v. Soc. for Savings*, 32 Conn. 173, PARK, J., dissenting.

² *Ins. Co. of North Am. v. Com.*, 87 Pa. St. 173. The term "corporation" in the act of Congress of June 30, 1864, in relation to internal revenue, declaring

that "every person, firm, company, or corporation owning or possessing or having the care or management of any railroad, canal, steamboat, ship, etc., engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, should be subject to and pay a duty of two and a half per cent. on the gross receipts of such railroad, canal, steamboat, ship," etc., was held not to include a State which had the exclusive ownership of a railroad, the income of which formed a part of the revenue of the State and was applied toward the support of its government. *State v. Atkins*, 35 Ga. 315.

commerce is asserted are in their nature national or admit of a uniform system, such as the transporting of passengers or merchandise through a State or from one State to another, they require the exclusive legislation of Congress, which is accordingly directed by the Constitution of the United States.¹ It is of national

¹ Const. of U. S., art. I, sec. 8. The interstate commerce act of Congress, approved February 4, 1887, applies to common carriers engaged in transporting passengers or property by railroad, or partly by railroad and partly by water, including in the term "railroad" bridges and ferries, under a common management, for a continuous "carriage or shipment from one State or Territory of the United States or the District of Columbia to another State or Territory of the United States or the District of Columbia; or from any place in the United States to an adjacent foreign country; or from any place in the United States through a foreign country to any other place in the United States; and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country." All charges for any service in transporting passengers or property, or for receiving, delivering, storage, or handling property under such circumstances, must be reasonable and just. If any common carrier, subject to the provisions of the act, charges, demands, collects, or receives from any person a greater or less compensation for any service specified as above than it charges or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, he will be deemed guilty of unjust discrimination. It is declared unlawful for any common carrier, subject to the provisions of the act, "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect." Common carriers, subject to the provisions of the act, are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting with them, and not to discriminate in their rates and charges between such connecting lines; but this is not to be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. It is declared to be unlawful for any common carrier, subject to the provisions of the act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circum-

importance that there should be a single regulating power over such subjects; for if one State could directly tax persons or property passing through it, or tax them indirectly by levying a tax upon transportation, every other State could do the same, and thus commercial intercourse between States remote from each other, would be seriously impeded, if not destroyed. Mr. Hamilton, in *The Federalist*,¹ in speaking of the evils which would be likely to result from permitting the several States to impose burthens on goods passing in the course of trade over their respective territories, said: "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious causes of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy. The commerce of the German empire is in continual trammels from the multiplicity of duties which the several princes and States exact upon

stances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this is not to be construed as authorizing any common carrier within the terms of the act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of the act such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the commis-

sion may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this provision of the act. It is made unlawful for any common carrier, subject to the provisions of the act, to enter into any contract, agreement, or combination with any other common carrier for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them; and in any case of an agreement for the pooling of freights, each day of its continuance is to be deemed a separate offense.

¹ No. 22.

the merchandise passing through their territories; by means of which, the fine streams and navigable rivers with which Germany is so happily watered, are rendered almost useless. Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens."

A tax on the business of a corporation habitually transporting passengers and commodities from State to State, the tax falling on the business in proportion to the number of passengers and the weight of the commodities transported, is within the meaning of the prohibitory clause of the Constitution of the United States with reference to the power of Congress to regulate commerce among the several States.¹ In *Almy v. California*,² it was held that a law

¹ *Erie R.R. Co. v. State*, 31 N.J. 531. In the State Freight Tax, 15 Wall. 232, it was held that the statute of a State imposing a tax upon freight transported from points without the State to points within it, or from points within the State to points without it, was unconstitutional. *SWAYNE* and *DAVIS*, JJ., dissented, claiming that the tax was imposed upon the business of those required to pay it, as shown by the fact that no discrimination was made between freight carried wholly within the State, and that brought into or carried through or out of it.

² 24 How. 169. The following statute of New York, passed May 31, 1881, was held void on the ground that such a tax was a regulation of commerce with foreign nations confided by the Constitution of the United States to the exclusive control of Congress: "There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel

from a foreign port to the port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent, or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York." *People v. Compagnie Gen. Transatlantique*, 107 U.S. 59. In *Turner v. Maryland*, 107 U.S. 38, it was objected that a law of Maryland was a regulation of commerce and unconstitutional, because it discriminated between the State buyer and manufacturer of leaf tobacco and the purchaser who bought for the purpose of transporting the tobacco to another State or to a foreign country. It was enacted (laws of Md. of 1872, sec. 26) that no tobacco of the growth of the State should be passed or accounted lawful tobacco, unless it was packed in hogsheads of a specified size. The general provision of the statute was to the effect that it should

of the State imposing a tax upon bills of lading for gold or silver transported from California to any port or place without the State, was substantially a tax upon the transportation itself, and therefore unconstitutional. In *Crandall v. Nevada*,¹ it appearing that the legislature of the State had enacted that there should be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire, and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that, though required to be paid by the carriers, it was a tax upon passengers for the privilege of being carried out of the State, and not a tax on the business of the carriers. For that reason, it was held that the law imposing it was invalid. An act of the legislature of Pennsylvania required the officers of the transportation companies of the State to make returns to the auditor-general of the number of tons of freight carried over, through, or upon the works of such companies for the three months immediately preceding the first days of January, April, July, and October of each year. And the several companies were required at the time of making such returns to pay to the State treasurer, for the use of the State, certain rates of tax per ton

not be lawful to carry out of the State in hogsheads any tobacco raised in the State except in hogsheads which had been inspected, passed, and marked, agreeably to the provisions of the act. If the tobacco was grown in the State and packed in the county or neighborhood where grown, it might be carried out of the State without having its quality inspected, if it was marked in the manner prescribed. But it was still necessary that it should be inspected in all other particulars, and inspect-

ed also to ascertain that it was grown in the State, packed where grown, and marked as required. If it did not answer the latter requirements, it was to be further inspected as to quality. It was held that the discrimination which favored the person who packed the tobacco for exportation in the county or neighborhood where it was grown as against other exporters was lawful, the State having a right to say what should be merchantable tobacco.

¹ 6 Wall. 35.

on each ton of freight carried. In an action by the State for the recovery of the tax, the State court decided that the statute was valid notwithstanding it imposed a tax on freight taken up within the State and carried out of it, or taken up without the State and brought within it. But on a writ of error, the Supreme Court of the United States held the act unconstitutional so far as it operated to tax interstate commerce ; that the transportation of freight, the subject of commerce, was a constituent of commerce, and a tax upon freight transported from State to State a regulation of commerce among the States.¹ In Maryland, an act imposed a tax of two cents a ton upon all coal mined in the State and transported by any of the ways enumerated, to any point in the State or elsewhere for sale. By the regular course of the coal trade of the State, much the larger portion of the coal mined there was transported without change of ownership directly from the mines either to points beyond the State, or to points within the State to be shipped for markets beyond the State limits. The act imposing the tax made, however, no discrimination between that portion of the coal which was transported to places within the State for sale, and the portion transported beyond the State for the purpose ; all of the coal mined in the State, and transported, whether in or beyond the State, being taxed alike. It was held that, with respect to such portion of the coal as was transported directly from the mines to places or markets beyond the limits of the State for sale, the tax was an interference with, and a restriction on, interstate commerce, and therefore in contravention of the Constitution of the United States.² The following act was held inoperative and void : "Every person, corporation, or association, or company of persons not a corpora-

¹ *Reading R.R. Co. v. State*, 15 Wall. 232. And see *Osborne v. Mobile*, 16 Co., 40 Md. 22. ² *State v. Cumberland & Pa. R.R.* Id. 479.

tion, engaged, or that may hereafter engage, in the business of transporting or carrying passengers by steam power, whether on land or water, in, through, upon, over, or across any portion of this State, or within the territorial limits of the same, shall on the first day of October next, and thereafter monthly on the first day of each month, or within five days thereafter, pay into the hands of the State treasurer, for the use of the State, a tax at and after the rate of ten cents for every passenger so transported within this State during the month then just ended. In case there be in the charter of any corporation liable to the provisions of this act, any clause or provision so restricting the amount of toll to be charged for the transportation of passengers, as that this act would, according to the present rate of charges by the said corporation, operate unjustly against it, then it is hereby declared and enacted that the said corporation shall have the right to increase the said toll to the amount of the tax herein provided for." The act further provided that where on the same occasion the passenger traveled over several connecting roads belonging to different companies, only one tax of ten cents was to be paid for traveling over all the connecting roads, and that this tax was to be paid by the company upon whose road the journey began; and that in ascertaining the aggregate amount of the tax to be paid, soldiers or sailors of the United States were to be omitted from the estimate of the number of passengers carried.¹ Where a party having purchased corn from various persons caused it to be removed to a railroad station and there put in cribs temporarily to await transportation beyond the State, it was held that in order to exempt the property from taxation there must be a purpose to ship as soon as transportation could be conveniently obtained, followed by actual shipment in a reasonable time.² The gross receipts of railroad or canal

¹ Clarke v. Phila., etc., R.R. Co., 4 Houst. Del. 158.

² Ogilvie v. Crawford County, 2 McCrary, 148.

companies after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, are legitimate subjects of taxation.¹ The State of Maryland granted to a railroad company the franchise of constructing a railroad from Baltimore to Washington, and employing thereon engines and cars for the transportation of passengers and merchandise, and charging therefor certain rates of fare for the one and freight for the other ; and it was stipulated that the company should, at the end of every six months, pay to the State one-fifth of the whole amount received for the transportation of passengers. It was held that the stipulation was not unconstitutional, as restricting intercourse and traffic between the different States.²

¹ State Tax on Railway Gross Receipts, 15 Wall. 284. MILLER, J., in the course of a dissenting opinion, said : "It is conceded that railroads may be taxed as other corporations are taxed on their capital stock, on their property real and personal, and in any other way that does not impose necessarily a burden on transportation between one State and another. But a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes, in this, that while their business is only remotely or incidentally connected with commerce, the business of roads and canals, namely, transportation of persons and property, is itself commerce. So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise; but that which carries goods from or to another State, is exempted by the constitution from its control." In the same case, STRONG, J., said: "The States have power to tax the real and personal estate of all their corporations, including carrying companies, just as they may tax similar property when belong-

ing to natural persons and to the same extent. Such tax may be laid upon a valuation, or may be an excise; and in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution proportioned either to the value of the privileges granted to the extent of their exercise, or to the results of such exercise. But a tax on goods and commodities transported into a State or out of it, or a tax upon the owner of such goods for the right thus to transport them, being a regulation of interstate commerce, is exclusively within the province of Congress."

² State v. Balt. & Ohio R.R. Co., 34 Md. 344; aff'd Railroad Co. v. Maryland, 21 Wall. 456. "The State," said the court in the foregoing case, "could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ in a constitutional point of view when it authorizes its private citizens to build the road,

A State tax on the gross amount of the receipts of express companies doing business in the State, excluding collections for transportation belonging to railroad and other companies domiciled and doing business beyond the limits of the State, is not unconstitutional, it not being a regulation of commerce among the States, or a duty on imports or exports.¹ The same was held in relation to a license tax upon business carried on by an express company in the city of Mobile, which business included transportation beyond the limits of the State, or rather the making of contracts within the State for such transportation beyond it;² and also as to a tax on the gross receipts of a telegraph company for the preceding year, which were mostly for messages originating or terminating out of the State, or chiefly earned on the company's lines outside of the State.³

The telegraph is an instrument of commerce, and telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce.⁴ A

and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. If the State as a consideration of the franchise had stipulated that it should have all the passenger money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives. The exercise of power on the part of a State is very different from the imposition of a tax or duty upon the movements or operations of

commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and therefore requiring the exclusive legislation of Congress." MILLER, J., dissenting.

¹ Southern Express Co. v. Hood, 15 Rich. 66; Walcott v. People, 17 Mich. 68.

² Osborne v. Mobile, 16 Wall. 479.

³ Western Union Tel. Co. v. Mayer, 28 Ohio St. 521.

⁴ Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

tax on messages, so far as it operates on private messages sent out of the State, is a regulation of foreign and interstate commerce, and beyond the power of the State. As to government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and therefore void.¹

The right of a State to tax a ship owned by one of her citizens, and having its *situs* within the State, although used in foreign commerce or in commerce between the States, has been distinctly recognized. In passenger cases,² McLEAN, J., said : "A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail, any more than taxing a ship regulates commerce, and yet in both instances the tax on the property in some degree affects its use." In *Transportation Co. v. Wheeling*,³ the court sustained a tax levied by the city of Wheeling upon steamboats used in navigating the Ohio River between that city and places on both sides of the river in the States of West Virginia and Ohio, the company owning the boats having its principal office in Wheeling.

The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State grants to a city the power to license, tax, and regulate ferries, the city may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the law by which this exaction is authorized will not be held to be a regulation of commerce. Neither does the section of the Constitution of the United States which prohibits a State from

¹ *Telegraph Co. v. Texas*, 105 U. S. 460. ² 7 How. 283.

³ 99 U. S. 273.

laying a duty of tonnage, protect a keeper of a ferry from a license tax upon his boats.¹ A statute of a State provided that each railroad company should, in the month of September annually, fix its rates for the transportation of passengers, and freight of different kinds; that it should cause a printed copy of such rates to be put up at all of the stations and depots, and keep a copy posted during the year; and that a failure to fulfil these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of a prescribed penalty. It was held not a regulation of commerce, but a police regulation, and therefore valid.²

§ 251. Taxation of corporate franchise.—There is a difference between a direct tax on the property of a corporation and a franchise tax measured by its earnings which represent, proximately at least, either the value of the franchise granted, or the extent of its exercise. The distinction has been repeatedly recognized by the courts.³ A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for a franchise. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures to impose any further tax upon the franchise.⁴ There is an essential difference between taxing land granted, or personal property sold, by the State to an individual, and taxing a franchise granted by the State to a corporation created by the very act of making the grant. The land and chattels are things corporeal, having an existence before the grant or sale, and continuing to exist afterward in

¹ Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365. See Fanning v.

² Phila. Contributionship, etc., v. Com., 98 Pa. St. 48.

Gregoire, 16 How. 524; Conway v. Taylor, 1 Black. 603.

⁴ Gordon v. Appeal Tax Court, 3 How. 133. But see Baltimore v. Balt.

² Railroad Co. v. Fuller, 17 Wall. 560. See Buffalo & Erie R.R. Co., 3 Brewst. Pa. 386.

& Ohio R.R. Co., 6 Gill, 288.

the hands of the grantee or vendee and his assigns independent of such grant or sale. A franchise, unlike land or personal chattels, has no existence until it is called into being by the act of the legislature or sovereign power of the State; and, in the very act of granting it to a corporation created for the purpose of taking it, a contract is formed between the State and the corporation which neither party is at liberty to vary without the consent of the other.¹ When the charter provides that the corporation shall pay a yearly tax on the capital stock paid in, and that no further or other tax or impost shall be levied or assessed upon the corporation, this not only exempts the corporation from the taxation of its franchises or privileges, but from all other taxation to which its property in common with that of individuals would have been subject without such special exemption.²

The amount of a franchise tax upon a corporate body may be graduated or measured by an appraisal of the whole, or of any portion of the corporate property, without thereby making it a property tax. Possessing the power to impose a franchise tax to any amount it deems proper, the legislature may measure the amount by any standard it pleases. It may fix the amount at a specified sum, as a poll tax is imposed upon an individual, and without regard to the amount of business the corporation does, or the amount of property it possesses, or it may graduate and measure the amount by an appraisal of the whole or any portion of its property, or by the amount of its business. The legislature may therefore impose a franchise tax measured by an appraisal of that portion of the corporate property and

¹ Atty. Genl. v. Bank of Charlotte, Gray, 16 Id. 203; Farrington v. Tennessee, 95 U. S. 683.
4 Jones Eq. 287; Chesapeake & Ohio

Canal Co. v. Balt. & Ohio R.R. Co., 4 Gill & Johns. 1. See Pennsylvania College Cases, 13 Wall. 214; Davis v.

² State v. Berry, 2 Harr. N. J. 80; Gardner v. State, 1 Zab. 557; State Bank v. People, 4 Scam. Ill. 303; Johnson v. Com., 7 Dana, 338.

franchises which will otherwise be likely to escape taxation, and to declare that this tax shall be in lieu of all taxes upon the shares, although if the tax had been on real or personal estate it would have been invalid.¹ In Massachusetts, the assessment authorized by the statute of 1864, ch. 208, sec. 5, was designed to be in the nature of an excise or duty on the franchise or privilege of each of the corporations designated, to be estimated and measured by ascertaining the excess of the market value of the capital stock or aggregate of the shares over the value of real estate and machinery for which each corporation was assessed in the town or city in which it was established and carried on its business. "There may be cases, therefore, where a corporation may be possessed of no personal estate whatever, the whole of its property being invested in real estate and machinery, and yet it may be liable to assessment under the provisions of the statute, because the market value of all its shares may exceed the value of its real estate and machinery; its franchise or corporate rights and privileges being estimated at a value beyond all of the property in its possession, as shown by the price for which its shares are sold in the market."²

As the excise is on the franchise and not on property of the corporation, it is no objection that a portion of the personal property consists of United States bonds, and that some of the stockholders are non-residents.³ Although, where a State tax is laid upon the property of an individual

¹ State v. Maine Centr. R.R. Co., 74 Me. 376.

² Com. v. Lowell Gas Light Co., 12 Allen, 75, per BIGELOW, C. J. It is the aggregate of all of the shares which must be taken as the value of the franchise for taxation; and it makes no difference that, by reason of privileges more or less permanently attached to some of the shares, there is a differ-

ence in their market value. Boston & Lowell R.R. Co. v. Com., 100 Mass. 399.

³ Com. v. Hamilton Manf. Co., 12 Allen, 298. See Com. v. New England Slate, etc., Co., 13 Id. 391; Com. v. Cary Improvement Co., 98 Mass. 19; Com. v. Berkshire Life Ins. Co., Ib. 25; Hamilton Co. v. Massachusetts 6 Wall. 632.

or a corporation, so much of the property as is invested in United States bonds is to be treated for the purposes of assessment as if it did not exist, yet this rule has no application to an assessment upon a franchise where a reference to property is made only to ascertain the value of the thing assessed, United States bonds being employed by the corporation as a means of accomplishing its purposes.¹ Where a statute of Connecticut provided that savings banks and societies for savings should pay annually to the State treasurer for the use of the State, a sum equal to three-fourths of one per cent. on the total amount of deposits in such institution on the first day of July in each year, it was held that as the tax was on the franchise and not on the property, it was valid, notwithstanding a part of the deposits were securities of the United States which were exempt from taxation.² In a similar case in Massachusetts the court said : "It appears to us that the assessment imposed by the provisions of the statute under consideration must be regarded as an excise or duty on the privilege or franchise of the corporation, and not as a direct tax on money in its hands belonging to depositors. . . . In the next place, the manner in which the amount of the assessment is to be ascertained, clearly indicates that the tax is designed to be a corporate charge. It is not a tax levied on each deposit at a certain rate in proportion to its amount, but is assessed on the amount of all the deposits in the bank, ascertained and fixed by the average sums which it has had in its hands during the six months preceding a specific day. It is the extent to which the corporation has exercised the franchise conferred on it by law of receiving deposits during a certain period, that is made the basis on which to estimate the sum which is to be paid for the enjoyment of the

¹ Monroe Savings Bank v. City of Rochester, 37 N. Y. 365.

² Society for Savings v. Coite, 6 Wall. 594.

privilege."¹ An act provided that "The secretaries, treasurers, or clerks of the several insurance companies chartered by this State, and conducted in whole or in part upon the plan of mutual insurance, shall, on or before the tenth day of October in each year, make returns and statements under oath to the comptroller of public accounts of the total amount of cash capital, either invested or on deposit, belonging to said companies respectively on the first day of October in that year, being the proceeds of insurance upon the plan of mutual insurance; and it shall be the duty of each of said insurance companies to pay to the treasurer of this State, for the use of the State, on or before the twentieth day of October in each year, a sum equal to one per cent. on its said capital; the same to be in lieu of all other taxes upon such capital, except any and all real estate held by such company over and above what may be necessary and used by such company for the transaction of its appropriate business." It was held a franchise tax, and not a property tax, and that it was therefore valid notwithstanding a portion of the cash capital was invested in Federal securities.² A tax complained of by a fire insurance company was levied under an act of New York,³ which, after mentioning the corporations subject to its provisions, continued as follows: "Shall be subject to and pay a tax upon its corporate franchise or business into the treasury of the State annually, to be computed as follows. If the dividend or dividends made or declared by such corporation, joint stock company, or association, during any year ending with the 1st day of November, amount to six, or more than six, per cent. upon the par value of the capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made and

¹ Com. v. Five Cents Savings Bank, 5 Allen, 428.

² Laws of N. Y. of 1880, ch. 542, sec. 3, amended by Laws of 1881, ch.

³ Coite v. Com. Mu. Life Ins. Co., 36 Conn. 512.

declared." When the dividends were under six per cent. another method of computation was provided. By the same act, a further tax of eight-tenths of one per cent. was to be paid annually into the State treasury by fire and marine insurance companies upon their corporate franchise and business. It was urged in behalf of the complainant, that because the act directed the amount of the tax to be arrived at in a particular way, that is, by requiring payment of a percentage upon declared dividends, and because such computation might be based in part upon interest derivable from funds invested in United States bonds, such method necessarily invalidated the tax to the extent of dividends accrued from the capital so invested. It was held, however, that the act imposed a franchise and not a property tax, and that its enactment constituted a lawful exercise of legislative power.¹

§ 252. Assessment upon national bank shares.—The word shares used in the act of Congress in reference to national banks was intended to be understood in the sense of choses, and not as aliquot parts of the capital stock; to designate the separate and individual property of the owners, and not their interest in the common property of the bank. The intention was to subject these shares to taxation as such property of the owner at their value, without any deduction on account of the franchise, or for investments of the capital or funds of the bank in untaxable bonds or real estate.² Taxes by the State are permitted to

¹ People v. Home Ins. Co., 32 N. Y. 328. The constitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. Where the ultimate burden rests upon the property of a corporation invested in United States securities, it is unconstitutional; but otherwise where it rests upon the

franchise of the corporation. State Freight Tax Case, 15 Wall. 232.

² Frazer v. Seibern, 16 Ohio St. 614; First Nat. Bank v. Farwell, 10 Biss. 270. Capital stock has never been treated as real property. In taxation it stands in the place of shares of stock, and when the latter are taxed, the former is exempt. Shares of stock have always been regarded as personal

be imposed wholly irrespective of the character or description of the property or capital of the bank, and this whether the shares have an actual value above or below the nominal amount.¹ It is within the constitutional power of Congress to establish a national bank in any State, and to provide that its shares shall have such a local nature as to be exempt from taxation by other States.² The equivalent taxation necessary to justify a tax upon the shares in national banks may be either upon the shares of the individual stockholders in the State banks and assessed against the stockholders, or it may be upon the capital of the bank and assessed against the bank itself, provided only that it be an equivalent. The tax against the owners of shares in the national banks must not exceed that imposed in some form upon the State banks or their stockholders.³ The restriction has reference to the rule of valuation adopted by the State in assessing taxes on the shares, as well as to the uniformity of percentage.⁴ National bank shares may, in

property in the same manner as promissory notes or bonds. *Cooper v. Corbin*, 105 Ill. 224; *Belleville Nail Co. v. People*, 98 Id. 399. See *Nevada Bank v. Sedgwick*, 104 U. S. 111.

Sec. 529 of the Revised Statutes of the United States, amended by act of Congress of Feb. 10, 1868, ch. 7, provides that "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner and holder of such shares in imposing taxes by authority of the State within which the association is located. But the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other capital in the hands of individual

citizens of such State, and that the shares of any national banking association owned by non-residents of the State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent according to its real value as other real property is taxed." See *Weaver v. Weaver*, 75 N. Y. 30; *McIver v. Robinson*, 53 Ala. 456; *Kyle v. Fayetteville*, 79 N. C. 445; *Austin v. Boston*, 96 Mass. 359.

¹ *National Bank v. Chicago*, 3 Biss. 82.

² *Flint v. Boston*, 99 Mass. 141.

³ *Frazer v. Seibern*, *supra*.

⁴ *People v. Weaver*, 100 U. S. 539. See *People v. Dolan*, 36 N. Y. 59; *Evansville Nat. Bank v. Britton*, 10 Biss. 503.

conformity with the mode of assessment adopted by the laws of the State, be assessed at their actual or market value, although it exceeds the par value.¹ A shareholder is entitled to deduct the amount of his debts from the assessed value of his shares when by the State law the owners of other personal property can deduct their debts from its value. But the assessors act within their authority until duly notified by a stockholder that he is entitled to such deduction.² The assessor should make the assessment for taxes on national bank shares against the shareholders personally. He has no right to collect the tax by selling the property of the bank, or the shares or other property of any shareholder except that of the delinquent.³

§ 253. Assessment upon property in general.—Different modes of taxation have been adopted from time to time in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the corporation; while in others the sum required to be paid is left to be ascertained by the amount of business the corporation transacts within a definite period. The design of the latter mode is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise.⁴ The rule of taxation is just when based upon the amount of cap-

¹ Hepburn v. School Directors, 23 Wall. 480; People v. Commrs. of Taxes, 94 U. S. 415; 67 N. Y. 516; 69 Id. 91.

² Supervisors v. Stanley, 105 U. S. 305; Albany Exchange Bank v. Wells, 18 Blatchf. 478; Browne's Nat. Bank Cas. 57; People v. Weaver, 100 U. S. 539; Nat. Ex. Bank v. Hills, 22 Alb. L. J. 451. See St. Joseph Bank v. St. Joseph, 46 Mich. 526.

³ First Nat. Bank v. Meredith, 44

Mo. 500. When the statute of a State exempts, for the purposes of valuation, assessment, and taxation, from the credits of an individual an amount equal to his *bona fide* and unconditional indebtedness, the same exemption must be made from the ascertained value of national bank stock. Ruggles v. City of Fond du Lac, 53 Wis. 436.

⁴ Society for Savings v. Coite, 6 Wall. 594.

ital paid in or secured to be paid in, and, after deducting the amount actually paid out for real estate, to assess the remaining capital at its actual value, leaving the real estate to be assessed like other real estate upon individuals in the town or ward where it is situated.¹ "The debts of a company may be considered in ascertaining the value of the capital stock, for such debts must be paid out of the property of the company, and the capital stock takes its value from what remains of the property after the payment of such debts. Thus, if a company has capital stock to the amount of \$1,000,000; and is indebted to the same amount, and has property of the value of only \$1,000,000, the stock of the company would be worthless, for its debts would require the entire property of the company to pay them. But if the stock of a company with such a capital should be found to be worth fifty cents on the dollar, then the property of the company must be worth \$1,500,000; for in that case \$500,000 worth of property would remain after the debts had been paid, and this would be applied on the capital stock, and would be sufficient to pay it to the extent of one-half or fifty cents on each dollar of the stock. Hence the true value of the stock of a company with the amount of the capital must represent the value of its property."²

Taxes may be imposed upon a corporation as an entity existing under the laws of the State as well as upon the corporate stock of the separate property; and the manner in which its property is assessed, and the rate of taxation, however arbitrary or capricious, are matters of legislative discretion. The tax may be proportioned to the income

¹ People v. Assessors, 39 N. Y. 81.

² State v. Housatonic R.R. Co., 48 Conn. 44. In New Jersey it was stated by the Supreme Court that the remedy for an overvaluation of real estate by the assessor of taxes was with

the commissioners of appeal, and that if they refused to correct the assessment, the court could give no relief unless it appeared that an erroneous principle was acted upon in making the assessment. State v. Powers, 4 Zab. 406.

received, as well as to the value of the franchise granted or the property possessed.¹

A State may give shares of stock held by stockholders a special value or particular *situs* for purposes of taxation, and may provide special modes for the collection of the tax levied thereon. The value and security of the shares may be enhanced by the investment of part of the capital stock of the corporation in real property in another State, which will not be subject to deduction or abatement from the value of the shares.² Under a statute providing that personal property, for the purposes of taxation, shall be construed to include stock in corporations, the general value of the shares must be taxed to the owners, and not to the corporation.³

¹ Delaware Railroad Tax Case, 18 Wall. 206. In New Hampshire, previous to the year 1830, toll bridges were not taxed. In that year an act was passed taxing them, together with mills, wharves, and ferries, one-twelfth of their net yearly income, after deducting the cost of repairs; and they were to be taxed to the owner or corporation —no provision having been made for the taxation of the shares. *Props. of Cornish Bridge v. Richardson*, 8 N. H. 207. Water-power for mill purposes which is not used is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement which cannot be taxed independently of the land. Where, therefore, a river divides two towns, and the water-power is used to propel mills located in one of the towns, the water-power is not taxable in the other town. *Boston Manf. Co. v. Newton*, 22 Pick. 22. Capital employed in manufacturing embraces whatever is essential to the prosecution of the business. *Gardiner Cotton, etc., Manf. Co. v. Inhabts. of Gardiner*, 5 Me. 111. In New York the terms "personal estate" and "per-

sonal property" in the statute include stock in moneyed corporations, and also such portion of the capital of incorporated companies liable to taxation on their capital as is not invested in real estate. *Rev. Sts. of N. Y.*, 7th Ed., ch. 13, p. 982. A joint stock association, which is a corporation within the meaning of the constitution of the State, is liable to taxation on its capital like other corporations. *Sandford v. Board of Supervisors of N. Y.*, 15 How. Pr. 172; *Mu. Ins. Co. v. Supervisors of Erie*, 4 Comst. 444.

² *Am. Coal Co. v. County Commissioners*, 59 Md. 185.

³ *Boston Water-Power Co. v. Boston*, 9 Metc. 199. A statute providing that every corporation organized under a charter or under general statutes, shall reserve from each dividend one-fifteenth part of the portion which was due and payable to its stockholders residing out of the State, and pay the same as a tax or excise on such estate or commodity to the treasurer of the State, is unconstitutional. *Oliver v. Washington Mills*, 11 Allen, 268. The gates, shut-offs, cocks, and faucets of an aqueduct

The voluntary payment of a part of the taxes assessed will not affect the right to recover the amount of money paid upon an illegal assessment. The reason of the rule arises from the power of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is on the tax list, in default of payment of taxes, which may be regarded as compulsory. In addition to the sum thus paid, the party will be entitled to recover interest from the date of the writ, or time of demanding payment in cases where there was no protest or denial of right at the time of paying such taxes ; and when paid under such protest or denial of liability to pay the same, the interest will be added from the time of paying the taxes.¹

§ 254. Assessment in the case of banking corporations.— Under the charter of a bank providing that a tax of one per cent. per annum should be levied on all shares, except those held by the State, which was to be paid to the State treasurer by the president or cashier of the bank on the first day of October in each year, the question was whether the tax was payable by the corporation out of the common fund, the number of private shares being the measure of

corporation, the water being passed through chambers and passages provided with filters and screens, are not taxable as machinery. *Dudley v. Jamaica Aqueduct Corp.*, 100 Mass. 183. Under an act giving trustees power to lay rates upon persons holding or enjoying any tenements, land, building, ground, hereditaments, or premises in the district, the material words by which a joint stock steamboat company was rated, were "tenement, land, landing-place, and premises, barge or barges, lying upon, fixed to, or connected with the same tenement, land, landing-place, or premises." The pier where passengers embarked consisted of three

floating barges, boarded over and kept in their places by chain cables fastened to anchors sunk in the bed of the river, the barges being connected by wooden bridges. Both bridges and barges rose and fell with the tide. It was held that the rate was not laid on the barges as distinguished from the land, but upon the landing-place and premises together with the barges by which the enjoyment of the land was rendered more profitable, and that the rate was therefore valid. *Regina v. Leith*, 21 L. J. N. S. 119; 10 Eng. L. & Eq. 370.

¹ *Boston & Sandwich Glass Co. v. City of Boston*, 4 Metc. 181.

the tax ; or whether it was payable out of the private shares only, so as to make each stockholder severally contribute annually to the public treasury one dollar for each share. It was held that the tax was payable out of the common fund in the hands of the officers as such, whether those funds consisted of capital or profits.¹ It was held that an individual banker doing business under the general banking laws of the State of New York, who assumed a special name by which his business as banker was characterized and known, might be assessed by that name ; that the warrant for the collection of the tax issued against such name might be levied upon the money used in the business of such banker ; and that the owner could not be permitted, as against the officer levying on the property of the bank, to claim that the bank was not a lawful corporation. The case was an action for the unlawful taking of bank bills and coin alleged to be the property of the plaintiff, under a warrant for the collection of taxes. The warrant on its face was against "The Pratt Bank." It was proved that a banking office was kept by the plaintiff in the city of Buffalo ; that over such office was a sign with the words "Pratt Bank of Buffalo"; that the banking business was carried on in the name of "The Pratt Bank"; that the bills issued, though signed by the plaintiff as banker, were issued in the name of "The Pratt Bank of Buffalo"; that the returns to the banking department of the State were made by the plaintiff in the name of "The Pratt Bank of Buffalo," the plaintiff verifying the same as president of that institution ; that before the assessment was made, he had served on the assessors a notice, dated at the Pratt Bank, stating that "the capital stock of the bank, after deducting real estate located in Buffalo," was a specified sum, which notice was subscribed and verified by him as "President of Pratt Bank"; that the assessors assuming the bank to be a corporation, so

¹ *State v. Bank of Newbern*, 1 Dev. & Batt. Eq. 216.

designated it in their roll by the name given it by its owner; that the tax was imposed in the same name; and that the warrant to the officer, in all other respects in due form of law, was issued against the Pratt Bank, as though it were a corporation.¹

§ 255. Assessment of railroad property.—For the purposes of taxation, property should be assessed at its present value. In the case of a railroad and other similar property designed not only for the profit of the owners, but for the accommodation of the public, the inquiry should be, what is the property worth to be used for the purposes for which it is constructed, and not for any other purpose to which it might be applied or converted, or for which it might be used. If the property is devoted to the use for which it is designed, and is in a condition to produce its maximum income, an important element for ascertaining its present value is its net profits. In connection with this would be the inquiry, what would prudent men give for the property as a permanent investment with a view to present and future income.² “We can conceive,” said the Supreme Court of Tennessee, “of no better criterion by which its value can be ascertained, than first the value of its structure, superstructure, and properties, and then the profits which may inure to its owners in its operation. . . . If it be an interstate railroad, as in this case, we know of no better plan to fix the taxable value of that portion lying in this State, than to ascertain what proportion the latter bears to the whole.”³

¹ Patchin v. Ritter, 27 Barb. 34. Under the general banking law of New York, the tax was to be levied upon the amount of the capital stock of the corporation paid in and secured to be paid in after deducting the amount expended for its real estate (which was taxed separately), and the stock owned by the State and by incorporated literary and charitable institutions. No attention was paid either to accumulations or

losses of capital in the course of the business of the company. To have ascertained the exact amount of capital at the time of making the assessment would often have been difficult, if not impracticable. People v. Niagara, 4 Hill, 20.

² State v. Ill. Cent. R.R. Co., 27 Ill. 64. See State Railroad Tax Cases, 92 U. S. 575.

³ Louisville, etc., R.R. Co. v. The State, 8 Heisk. 663.

In an early case in Illinois, it was held that the portion of a railroad which lay within a county was taxable there, and the valuation must be of that specific part of it situated in such county without reference to the whole road.¹ Where, however, the real property belonging to a railroad company consisted of a strip of land a few rods in width upon which the railroad track was located, with the necessary stations, buildings, etc., it was decided that the land should not be assessed as an isolated piece of property, but as a part of the whole railroad, and its value be estimated in connection with its position, and the business and profits derived from it.² So in *People v. Fredericks*,³ it was held that the real estate of railroad companies should be assessed at its value for the purposes to which it had been adapted, and that the assessors were not bound to consider it mere land and superstructure isolated from other parts of the road. In an earlier case in the same State, the court said it was the duty of the assessors to estimate the property of a railroad company at its full and true value, and that in ascertaining this value the superstructure and fixtures, and everything annexed to the land, were to be taken into account; but that whether the business of the road was productive or unproductive were questions with which the assessors had nothing to do. They were simply to ascertain the value of the land and of the erections and fixtures thereon, irrespective of the consideration whether the road was well or ill managed, or whether it was profitable to the stockholders or otherwise.⁴ The charters of certain railroad companies au-

¹ *Sangamon, etc., R.R. Co. v. Morgan*, 14 Ill. 163.

² *People v. Barker*, Am. R.R. Rep. 149; 48 N. Y. 70.

³ 48 Barb. 173.

⁴ *Albany, etc., R.R. Co. v. Town of Canaan*, 16 Barb. 244. See *Swift v. Poughkeepsie*, 37 N. Y. 511; *Buffalo, etc., R.R. Co. v. Supervisors, etc.*, 48

Id. 93. As to the taxation of the capital stock of a railroad company, see *Mohawk, etc., R.R. Co.*, 4 Paige Ch. 384. Land cannot be assessed as "railroad track" and also as town and city lots. *Chicago & Northwestern R.R. Co. v. Miller*, 72 Ill. 144. When the land in respect to which the assessment is made is sufficiently described,

thorized them "to purchase and hold all real estate that may be necessary and proper for the purpose of laying, building, and sustaining said railroads, and the said railroads, and the appurtenances of the same, shall not be taxed higher than one-half of one per cent. upon their annual net income, and no municipal or other corporation shall have power to tax the stock of said companies within the jurisdiction of said corporation in the ratio of taxation of like property." It was held that all the property of these companies which was necessary and proper for the laying, building, and sustaining their respective railroads, constituted a part of the capital stock of the companies, and was not liable to be taxed in any other manner than that specified; but that any other property owned by such companies not necessary and proper for the laying, building, and sustaining said railroads, and not necessarily appertaining to them for that purpose, might be taxed by the county, or other corporation, the same as similar property.¹

Railroad mortgages which are liens on the road, and take precedence of the shares of the stockholder, may or not extinguish the value of his shares. They must in any event affect the value of the exact amount of the aggregate debts. When, therefore, the current cash value of the whole funded debt, and the current cash value of the entire number of shares, have been ascertained, the true value of the road has been arrived at, its property, its capital stock, and its franchises; and this would furnish a fair basement of assessment.²

an accidental misnomer by the introduction of a word into the name of the corporation is no objection. Worcester Agr. Soc. v. Worcester, 116 Mass. 189.

¹ The Ordinary, etc., Cent. R.R., etc., Co., 40 Ga. 646. See Mobile & Ohio R.R. Co. v. Moseley, 52 Miss. 127.

² State R.R. Tax Cases, 92 U. S. 575. Bonds issued by a railroad company

are the property of the holders, not of the obligor. So far as they are held by non-residents of the State they are property beyond the jurisdiction of the State, although secured by a mortgage upon property situated in the State, and a law which interferes between the company and a non-resident bondholder, and under the pretence of levying a tax, directs the company to with-

The statutes of Connecticut, for the purpose of taxation, take the market value of the stock of railroad companies as its true value. The market value of such stock usually differs but little from its real value, and there is probably no convenient mode by which a more accurate valuation of the stock could be made.¹ The act incorporating a railroad company authorized it to procure, purchase, and hold in fee simple, improve and use for all purposes of business to be transacted on the road, or by means of the company, lands, or other real estate, and to manage and dispose of the same ; and that the capital stock of the company should consist of three hundred thousand dollars, divided into shares of one hundred dollars each, to be held and regarded as personal estate. It was determined that the property of the company was not subject to taxation otherwise than as personal estate.²

When a railroad company is formed by a consolidation forming a continuous line, a State cannot tax the gross earnings of all the roads. Such a tax would be illegal, not only because not levied by any rule of equality as between the companies, and unjust from its disproportion to other railroad taxes, but it would be in excess of State power. "No State can have any authority to take advantage of the fact that a portion of a railroad is within its limits to draw within its taxing power all the road or all its business. As well might it take advantage of the temporary presence of a non-resident within its limits to compel him to pay taxes on his homestead in another State, or on his business not

hold a portion of the stipulated interest and pay it over to the State, impairs the obligation of the contract between the parties. State Tax on Foreign-held Bonds, 15 Wall. 300. Where shares in a railroad company pledged to a bank as collateral security for the payment of a promissory note given to the bank for money loaned, were

taxed as the property of the bank, it was held illegal, the pledgor being the owner of the property pledged. Waltham Bank v. Waltham, 10 Metc. 334.

¹ State v. Housatonic R.R. Co., 48 Conn. 44.

² Bangor, etc., R.R. Co. v. Harris, 21 Me. 533.

carried on under the protection of its laws."¹ In Connecticut, under a statute providing that where only a part of a railroad lay in the State the company owning such road should pay one per cent. on such proportion of the valuation as the length of its road lying in the State bore to the entire length of the road, it was held that a perpetual lease by a Connecticut railroad company of two Massachusetts railroads forming a continuous line, was not to be regarded as the owning of the Massachusetts roads, and that the Connecticut company was not entitled to a deduction from the valuation of its property on account of them.²

Some of the duties of assessors are judicial in their nature, and as to these, when acting within the scope of their authority, they are protected to the same extent as other judicial officers. But as they are subordinate officers possessing no authority except such as is conferred by statute, they must see that they act within the power committed to them. When in a given case they have no power to act, either as to person or property, their acts are void; and it is the same when their right to act depends upon the existence of some fact which they erroneously determine to exist. So in performing a ministerial duty, their acts are void if not in accordance with law. But when they have jurisdiction of the person and subject matter, if they err in the exercise of it, they are protected.³

¹ State Treasurer v. Auditor-General, 46 Mich. 224, per COOLEY, J.

² State v. Housatonic R.R. Co., 48 Conn. 44. In New York a railroad company acquired its right and title to land under a statute by which it was made lawful for any railroad company to contract with the chiefs of any nation of Indians over whose land it might be necessary to construct a railroad for the right to make its road upon such land. There was no limitation of time in the contract. It was provided, however, that the contract

should not vest in the railroad company the fee of the land described, nor the right to occupy the same for any purposes other than what might be necessary for the construction, occupancy, and maintenance of the road. It was held that the land was owned by the company within the contemplation of the revised statutes touching taxation, and was liable to be assessed as property of the company. People v. Beardsley, 52 Barb. 105.

³ Nat. Bank v. Elmira, 53 N. Y. 49. It was held in New York that the roll-

§ 256. Taxation must be equal.—The fourteenth amendment of the Constitution of the United States in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. The constitutions of several of the States require “equality and uniformity” in the taxation of property, which is held to mean that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay the like amount upon similar kinds of property of the same value.¹ To compel the payment of money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, would be a forced contribution, not a tax, duty, or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government.² Such a power would not be that of taxation, but of eminent domain. A tax upon the persons or property of A., B., and C., individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class

ing stock of a railroad company is personal property, and as such is liable to be seized and sold for the collection of a tax against the company; that a collector's warrant overrides a title acquired by purchase upon the foreclosure of a mortgage given to secure the bonds of the company, and all equities of third persons in the property; and that the question was not affected by the mode of propelling the cars, whether by steam, horse, or any other power. *Randall v. Elwell*, 52 N. Y. 521. See *Hoyle v. Plattsburgh Ins. Co.*, 54 Id. 314. Notwithstanding the statute of

Wisconsin makes the rolling stock of a railroad company a fixture for certain purposes, if the treasurer of a borough seizes such property for taxes without authority, he will be liable to an action of trespass. The legal remedy in such case being adequate, a court of equity will not interfere by injunction. *Chicago, etc., R.R. Co. v. Borough of Fort Edward*, 21 Wis. 44. See Taylor's *Sts. of Wis.*, p. 1048, sec. 53.

¹ *Railroad Tax Case*, 8 Sawyer, 238.

² *Woodbridge v. Detroit*, 8 Mich. 301.

of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for public use without compensation. The process is one of confiscation, and not of taxation.¹

When a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when this rule is applied not solely to an individual, but to a class of persons or corporations, equity may interfere to restrain the operation of the unconstitutional exercise of power.² Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. The uniformity must be coextensive with the territory to which it applies, and embrace all property subject to taxation.³ Practically, it is impossible to secure exact equality or proportion in the imposition of taxes, or distribution of public burdens requiring taxation. The test in all legislative enactments affecting taxation is, that their aim be toward that result, by approximation at least.⁴ Although the State may elect to tax either the

¹ *State v. Township of Readington*, 36 N. J. 70.

² *Cummings v. National Bank*, 101 U. S. 153.

³ *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 15. A tax is equal and uniform which reaches and bears with the like burden upon all the property within the given district. It does this, when the valuation of each parcel is ascertained in the same mode, and when it is subject to the same rate of taxation as other property within the district. The benefits derived or to be derived from the expenditure of the tax cannot be taken into the account. *People v. Whyler*, 41 Cal. 351. See *Emery v. San Francisco Gas Co.*, 28 Id. 345. The legislative assessment of

a tax upon a body of individuals selected out of a general class without apportionment or equality as between them and the general class, or as between themselves, and without giving them an opportunity to be heard, is void. *Alb. Nat. Bank v. Maher*, 19 Blatchf. 175; s. c. 20 Id. 341.

⁴ *Cheshire v. County Commrs.*, 118 Mass. 386. In Massachusetts, the statute of 1872, ch. 306, requires that all taxes levied under its authority be "proportional and reasonable," and forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment, or indirectly through arbitrary

capital stock, or the real and personal property of a corporation, yet it cannot tax both; and if it elect to tax the real and personal property and not the stock, such property must be assessed according to the same equal and uniform rate in proportion to its value, as all other property in the State. It is not competent to the legislature to discriminate between different species of property, and to tax some by one rule and some by another.¹

In a suit by a corporation to restrain by injunction the collection of a tax on the ground that the shares of stock are assessed at a greater rate than other moneyed capital in the hands of individual citizens, there must be a distinct averment in the bill that the shares are valued higher for the purposes of taxation than other moneyed capital generally. It is not sufficient to allege that such is the fact in a particular instance, nor merely that the assessments are partial, unequal, or unjust.² In an action for the recovery of State and county taxes claimed to be due from a railroad company, it appeared that, by the constitution of the State, a mortgage, deed of trust, contract, or other obligation by which a debt was secured, was treated for the purposes of assessment and taxation "as an interest in the property affected thereby," and, "except as to railroad and other quasi public corporations," the value of the property less the value of the security was to be assessed and taxed to its owner, and the value of the security was to be assessed and

and unequal methods of valuation. Equality of taxation is not enjoined by the bill of rights of Pennsylvania. *Kirby v. Shaw*, 19 Pa. St. 258. Stock may be fully taxed to the corporation, and also to the stockholders; and a stockholder in a corporation of another State may be compelled to pay a tax to Pennsylvania on his stock, he being a resident of Pennsylvania, although the whole property and stock are sub-

ject to taxation in the State of its location. *Whitesell v. Northampton County*, 49 Pa. St. 526; *Pittsburg, etc., R.R. Co.*, 66 Pa. St. 73.

¹ *State v. Cumberland & Pa. R.R. Co.*, 40 Md. 22.

² *German Nat. Bank v. Kimball*, 103 U. S. 732; *First Nat. Bank v. Farwell*, 10 Biss. 270; *People v. Weaver*, 100 U. S. 539; *Pelton v. Nat. Bank*, 101 Id. 143; *Cummings v. Nat. Bank*, *supra*.

taxed to the holder. But "the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county" were to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads were located, in proportion to the number of miles of railway laid therein; no deduction from this value being allowed for any mortgages on the property. There was also a different system of assessment provided for "the franchise, roadway, road-bed, rails, and rolling stock" of railroads operated in more than one county, from that provided for other property. The assessment of other property was to be made in the county, city, or district in which it was situated; and the supervisors of each county, who constituted a board of equalization of the taxable property of the county, were required to act upon prescribed rules of notice to the owners. A State board of equalization was also created to equalize the valuation of the taxable property of the several counties, so that equality might be preserved between the tax-payers of the different localities, and its action in this respect must likewise be upon prescribed rules of notice. The assessment of the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county in the State, was to be made by the State board. But in making it the board was not required to give any notice to the owners, and no provision was made for affording them an opportunity to be heard respecting the valuation of their property. It was held that the assessment upon which the taxes were levied was void, and that judgment must be entered for the defendant.¹

When the constitution of a State authorizes the legislature to tax persons and corporations owning and using

¹ Railroad Tax Case, 8 Sawyer, 238; State Board of Equalization, 60 Cal. 12; San Francisco & North Pacific R.R. Central Pacific R.R. Co. v. State Board Co. v. Dinwiddie, Ib. 312. See San of Equalization, Ib. 35. Francisco & North Pacific R.R. Co. v.

franchises in such manner as it shall from time to time direct by a general law uniform as to the class upon which it operates, a statute is valid which prescribes a different rule of taxation for railroad companies from that applied to individuals, if the rule is uniform as to all of the railroad property of the State.¹ By an act of New York² all corporations, except banks, life insurance and manufacturing companies, are taxable upon their dividends when the dividends declared during the year amount to six per cent. or more; and when there are no dividends, or the dividends are less than six per cent., the tax is to be assessed upon a valuation of their capital stock, and the capital stock and personal property are exempted from other assessment or taxation. In a suit by a national bank to restrain the collection of a tax assessed against the stockholders of the complainant, it was claimed that the foregoing act subjected the corporations specified to moderate taxation, and exempted their stockholders from any other taxation upon their stock and personal property in such corporations, while the act for the taxation of banks provided for a tax upon the shareholders and an assessment on the value of the shares, thereby imposing a much heavier tax. It was held that the objection could not prevail, as stockholders in national banks were not subjected to a discrimination or rule of assessment which did not obtain in relation to stockholders in other corporations, because the act for the taxation of corporations generally did not exempt individuals from assessment or taxation upon their personal property or moneied capital invested in the shares of such corporations; there being a wide difference for the purposes of taxation between the capital stock and personal property of a corporation and the shares held by the several stockholders.³ An act of New York provided in substance that

¹ State Railroad Tax Cases, 92 U. S. 575. ² Alb. Nat. Bank v. Maher, 19 Blatchf. 175; s. c. 20 Id. 341.

³ Laws of 1880, ch. 542.

an insurance corporation of another State seeking to do business in New York should pay to the superintendent of the insurance department for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to that imposed by the State of its origin upon companies of New York seeking to do business there. It rested upon the idea that the comity due from one State to another is not required to be more than equal and reciprocal, and that what is wholly matter of privilege may be granted or withheld upon conditions. It was decided that the act was not invalid, on the ground that it left the amount of the tax or fine to the legislative discretion of another State, and was therefore an unlawful delegation of power; nor repugnant to the clause of the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.¹ The legislature of Ohio passed laws creating the office of inspector of gas meters and illuminating gas, and providing for the payment of the salary of the officer and of the cost of apparatus necessary for the discharge of his duties by an assessment upon the several gas companies of the State in proportion to the amount of capital invested by each. The enactments were held not in contravention of the constitution of the State, which provided that laws should be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; the assessment complained of not being a tax on property, but a charge upon individual corporations and the business in which they were engaged.²

§ 257. Double taxation.—The general policy of the law is to avoid duplicate taxation, and it will not be presumed that the legislature intended it, unless the language of the

¹ People v. Fire Assoc. of Phila., 92 N. Y. 311.

² Cincinnati Gas Light & Coke Co. v. The State, 18 Ohio St. 237.

statute imposing such a tax is clear and unequivocal.¹ No one subject of taxation should be required to contribute more than once to the same public burden while other subjects of taxation belonging to the same class are required to contribute but once. "Any legislation, therefore, which requires for the purpose of taxation an *ad valorem* assessment of all the shares of stock in a bank as property without allowing any deduction on account of the value imparted to them as the representatives of the corporate property and franchise of the bank, and also a like assessment of the corporate property itself under its own proper designation, necessarily provides for double taxation, and in order to give the statute that effect, it must clearly appear to have been intended by some express provision or necessary implication."²

¹ Boston & Sandwich Glass Co. v. Boston, 4 Metc. 181. See Savings Bank v. Nashua, 46 N. H. 389; Republic Life Ins. Co. v. Pollok, 75 Ill. 292; Valle v. Zeigler, 84 Mo. 214; Cook v. Burlington, 59 Iowa, 251; County of Lackawanna v. First Nat. Bank, 94 Pa. St. 221; Jersey City, etc., Co. v. Jersey City, 46 N. J. 194; Belo v. Commrs. of Forsyth, 82 N. C. 415; Cheshire, etc., Telephone Co. v. State, 63 N. H. 167; Farrington v. Tennessee, 95 U. S. 679; Frazier v. Seibern, 16 Ohio St. 614; Ryan v. Commissioners, 30 Kansas, 185.

² Commissioners, etc., v. Citizens' Nat. Bank, 23 Minn. 280. In Maryland, to tax the property of a bank and its capital stock at the same time is forbidden by the constitution and laws of the State. "It is unquestionably true that the property of a corporation does not belong to the shareholders; they are not the legal owners, but they have an equitable or beneficial interest therein. It is held and managed for their use and benefit, and under their control and direction. It is not a mere metaphysical subtlety to say that the corporate property is represented by the shares of stock. It is substantially true, for a tax assessed on the property of the corporation is in reality imposed upon the shareholders, and is paid by them indirectly." Commissioners v. Farmers' & Mechanics' Nat. Bank, 48 Md. 117, per BARTOL, C. J. And see Gordon v. Mayor, etc., of Baltimore, 5 Gill, 231; Tax Cases, 12 Gill & Johns. 117. In the same State it was held that the exemption from taxation of the shares of the capital stock of a railroad company under its charter carried with it the exemption of the property of the company, because, for the purposes of taxation, the former represented the latter. Mayor, etc., of Baltimore v. Baltimore & Ohio R.R. Co., 6 Gill, 288. This construction of the charter of a railroad company was affirmed in State v. Balt. & Ohio R.R. Co., 48 Md. 49. And see to the same effect Phila., etc., R.R. Co. v. Bayless, 2 Gill, 355. In State v. Cumberland & Pa. R.R. Co.,

A bonus is sometimes demanded and received from a bank or other corporation at the time of granting its charter, and afterward all that class of corporations are expressly subjected to another rate of taxation. When, however, the legislature has taxed all of the property of a particular corporation in a specified manner, and has intimated no design to subject it to any further taxation, it will not be presumed that both general and special taxation are intended.¹ The legislature may make a difference for the purposes of taxation between the capital stock of a corporation in the hands of the corporation itself and the shares of the capital stock in the hands of the individual stockholders. That has often been done. A tax upon a railroad after its completion is necessarily a tax upon the capital, because practically the capital and that into which it has been converted are the same. A railroad belonging to a corporation may be worth more than its capital, but all its capital is in its railroad. Such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation.²

Where a railroad company formed by the consolidation of four companies, three of which were in Pennsylvania and one in Maryland, executed a mortgage to trustees on the entire line of its road to secure the payment of bonds, it was held that the interest of the bonds could not be taxed in the hands of a non-resident holder. NELSON, J., in delivering the opinion of the court, remarked that if the State

40 Md. 22, the court said: "The capital stock of the several mining companies of the State is liable to taxation according to a fixed and certain rate, and the stock being the representative of the whole property of the corporation, the payment of the tax on the capital stock exempts from taxation all the property, both real and personal, of the company. And although the State

may elect to tax either the capital stock or the real and personal property of the company, yet it cannot tax both." See *State v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 265. See *Burke v. Ballam*, 57 Cal. 594.

¹ *N. Y. & Erie R.R. Co. v. Sabin*, 26 Pa. St. 242.

² *Tennessee v. Whitworth*, 117 U.S. 129.

of Pennsylvania were at liberty to tax the bonds to the extent of the Maryland portion of the road, she was taxing property and interests beyond her jurisdiction, and that portion would avail her tax roll as effectually as if it were situate within her own limits; that the Maryland portion was not liable for the payment of any specified part or quantity of the bonds thus taxed, but was liable with all its interests for the whole amount, the same as the portion of the road within Pennsylvania; that the security was given on the entire line of the road, no portion of the bonds belonging to one part more than to another; that no severance was made of the bonds, and, therefore, none could be made in the taxation with reference to the line within the respective jurisdictions of the States; that if the tax were permitted as to one bond, it must be as to all; and that the consequence would be double taxation of the bondholder.¹

The power of taxation originally inherent in the States is not abridged by the grant of a similar power to the national government, but is to be concurrently exercised by the two governments. The internal revenue act of 1864,

¹ Railroad Co. v. Jackson, 7 Wall. 262, CLIFFORD and SWAYNE, JJ., dissenting. "It is not perceived how the fact that the mortgage given for the security of the bonds covering that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used that, to permit a deduction of the tax from the interest, would be giving effect to the laws of Pennsylvania upon property beyond her

jurisdiction. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised." FIELD, J., in State Tax on Foreign-held Bonds, 15 Wall. 300. It scarcely seems to us that the reasons on which the opinion was based in Railroad Co. v. Jackson, *supra*, are amenable to the foregoing criticism, the point emphasized by the court being, as we understand the case, that, as the property on which the mortgage was given to secure the bonds lay in two States, if the bonds could be taxed in the hands of a non-resident in one State, they could in both, and that there would be double taxation.

and that of 1866, provide that no tax levied thereunder shall preclude the States from similar taxation for their own purposes. The subject was fully discussed by the Supreme Court of the United States in *The License Tax Cases*¹ and in *Pervear v. Com.*² In the former case, the Chief Justice, referring to the act of 1866, says: "This judicious legislation has removed all future possibility of the error which has been common among persons engaged in particular branches of business that they obtained from the licenses under the internal revenue laws an authority for carrying on the licensed business independently of State regulation and control, and it throws, moreover, upon the previous legislation all the light of a declaratory enactment." It was held in that case that the recognition by the acts of Congress of the power and right of the States to tax, control, or regulate any business within their limits was entirely consistent with an intention on the part of Congress to tax such business for national purposes. And in *Pervear v. Com.* it was ruled that a law of a State taxing a business already taxed by Congress is not unconstitutional. The houses, lands, and goods belonging to a corporation are not exempted from the payment of taxes merely because they were purchased with its capital stock

¹ 5 Wall. 462.

² 5 Wall. 475. In a suit to enjoin the collection of taxes levied by a municipal corporation upon a national bank the complaint alleged that the plaintiff paid the taxes on the money with which certain bank stock was afterward purchased, and that he could not, therefore, be assessed for the stock. It was held that as the plaintiff owned the money at the time it was assessed to him, and the stock at the time that was assessed to him, there was no way in which he could escape payment of the assessment on both. *City of Richmond v. Scott*, 48 Ind. 568, WORDEN,

J.: "The plaintiff was rightfully assessed for the money which he held on the first of January. It was optional with him to purchase the bank stock before the first of April. He must be supposed to have done so with the knowledge that the city might impose the tax upon him for the stock which he held on that day. There may be a hardship in the law as it applies to some particular cases, but this does not render it unconstitutional or invalid. It is impossible to so frame a law for the assessment and collection of taxes as that it will not in some cases work a hardship."

on which it is obliged to pay a tax.¹ So, notwithstanding a corporation has paid a tax upon its real estate purchased with money paid in as capital stock, it may still be bound to pay the tax imposed on its shareholders, retaining the same out of their dividends.² In New Hampshire, if stock in a foreign corporation pays a full tax in the State where the corporation and the corporate property are situated, it is not liable to be taxed to a resident stockholder. A citizen has a right to invest his money in land or other property situated abroad, and if it is actually taxed there, the principle of the statute exempts it from double taxation. If it does not bear the burden of taxation in the State where it is situated, it is taxable, when in the stock of a corporation, in New Hampshire as personal property, though the corporate property be land or affixed to land.³

A person who is taxed in two different places for the same property when he is only legally liable to be taxed once, and when it is doubtful to which the right to tax belongs, may file a bill of interpleader to compel the tax collectors to settle the right between them.⁴

§ 258. Right of State to exempt from taxes.—The power of the legislature of a State to exempt the property of corporations from taxation, not merely during the period of its own existence, but so as to be beyond the control of the taxing power of succeeding legislatures, has been asserted in several cases by the Supreme Court of the United States, as well as by the State courts, with the qualification that the terms of the grant clearly and distinctly show that such was the intention of the legislature, although against this

¹ Lackawanna Iron Co. v. Luzerne County, 42 Pa. St. 424.

² Ensley v. Memphis, 6 Baxter Tenn. 554; Nashville Gas Light Co. v. Nashville, 8 Lea Tenn. 406. A telegraph company is liable to taxation notwithstanding it pays a privilege tax. West-

ern Union Tel. Co. v. State, 9 Baxter Tenn. 509; 40 Am. Rep. 99, MCFARLAND, J., dissenting.

³ Smith v. Exeter, 37 N. H. 556.

⁴ Thompson v. Ebbetts, 1 Hopk. Ch. 272.

doctrine there have been earnest protests by individual judges.¹ In order that the exemption may be effectual, it must appear that the contract was made in consequence of some beneficial equivalent received by the State, it being conceded that if the exemption was granted only as a privilege, it may be recalled at the pleasure of the legislature.²

Exemptions from taxation necessarily increase the burdens imposed on property not exempt, and are thus injurious to the tax-payer. The incidental benefits which it is contemplated may thereby result to him in common with the community at large are speculative, and not always, or

¹ Gordon v. Appeal Tax Court, 3 How. 133; Branch State Bank v. Knoop, 16 Id. 386; Jefferson, etc., Bank v. Skelly, 1 Black. 436; Dodge v. Woolsey, 18 How. 331; Mechanics' & Traders' Bank v. Thomas, Ib. 384; Same v. Debolt, Ib. 380; McGee v. Mathis, 4 Wall. 143; Home of the Friendless v. Rouse, 8 Id. 430; Washington University v. Rouse, Ib. 439; Minot v. Phila., etc., R.R. Co., 18 Id. 206, aff'g 2 Abb. U. S. 323; Wells v. Cent. Vt. R.R. Co., 14 Blatchf. 426; Louisville & Nashville R.R. Co. v. Gaines, 3 Fed. Rep. 266; 2 Flippin, 621; Tucker v. Ferguson, 22 Wall. 575; West Wisconsin R.R. Co. v. Trempealeau County, 93 U.S. 593; Farrington v. Tennessee, 95 Id. 677; New Jersey v. Yard, Ib. 104; University v. People, 99 Id. 309; Hoge v. Railroad Co., Ib. 348; Railroad Co. v. Loftin, 105 Id. 258; s. c. 98 Id. 559; Bank of Commerce v. McGowan, 6 Lea Tenn. 703; Dauphin, etc., R.R. Co. v. Kennerly, 74 Ala. 583; Atlantic, etc., R.R. Co. v. Allen, 15 Fla. 637; Mobile, etc., R.R. Co. v. Moseley, 52 Miss. 127. See Railroad Co. v. Commissioners, 103 U. S. 1; Humphrey v. Pegues, 16 Wall. 214; Macon v. Cent. R.R. Co.,

50 Ga. 620; State v. Woodruff, 37 N. J. 139. The charter of a railroad company providing that the capital stock shall be forever exempt from taxation, and that the road with its fixtures shall be exempt for twenty years, exempts the latter only for the time named, but forever exempts the former. Tennessee v. Whitworth, 117 U. S. 129; Railroad Cos. v. Gaines, 97 Id. 697. When two railroad companies, whose shares are by the law of the State exempt from taxation, are consolidated, and the shares in the consolidated company are exchanged for the shares in the old companies, the new shares are exempt from taxation. Tennessee v. Whitworth, *supra*.

² Railway Co. v. Philadelphia, 101 U. S. 528; County Commissioners v. Annapolis, etc., R.R. Co., 47 Md. 592. See Morgan v. Louisiana, 93 U. S. 217; Railroad Co. v. Commissioners, 103 Id. 1. Exempting property from taxation does not exempt it from assessments made for the expense of improvements specially beneficial to the property. Hassan v. City of Rochester, 67 N. Y. 528; Roosevelt Hospital v. Mayor of N. Y., 84 Id. 108; Harvard College v. Boston, 104 Mass. 470.

perhaps generally, a compensation for the immediate injury sustained. Invidious exemptions and discriminations by which the property of an individual or of a corporation is relieved from bearing a just proportion of the common burden taxation is intended to sustain, are violative of the equal rights of citizens.¹ But the assumption that a State, in exempting certain property from taxation, relinquishes part of its sovereign power is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the public. Exemptions are therefore questions of policy, and not of power.² Where "a State has stipulated for a valid consideration to exempt certain property from taxation, as it has been repeatedly held it may do, the stipulation cannot subsequently be withdrawn, and the property be subjected to taxation. The provision which secures the inviolability of contracts against State legislation stands as a perpetual interdict against the imposition of the charge. It is to no purpose in such case to speak of the power of taxation as an attribute of State sovereignty which cannot be surrendered. That sovereignty, whatever its extent, must be exerted in subordination to the prohibition of the constitution, which is the supreme law of the land."³ The

¹ See *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570.

² *Piqua Bank v. Knoop*, 16 How. 369.

³ FIELD, J., in *Railroad Tax Case*, 8 Sawyer, 238. In *Washington University v. Rouse*, 8 Wall. 439, MILLER, J., in dissenting from the opinion of the court, said: "We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever, the taxing power of the State. This is a power which in modern and political societies is absolutely necessary to the continued existence of every such society. While

under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal services from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold then that any one of the annual legislatures can by contract deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful. It cannot be maintained that

conclusions of the Supreme Court of the United States on the subject are: that the grant of a corporate franchise by an act of legislation is a contract between the State and the grantee, the obligation of which a subsequent legislature cannot impair; and that if the legislature in creating a corporation prescribes a rate of taxation, and expressly releases the power to impose further taxes, or does not expressly reserve the power, a subsequent tax law impairs the obligation of the contract and is void. The theory is, that the legislature represents the people for the purpose of making contracts, as well as for making laws; that the grant of a franchise is not merely an act of legislation, but is also a contract, and that the legislature holds the taxing power, and therefore may bargain it away precisely as it holds and may grant the power of corporate franchises.¹ The legislature of a State may exempt particular parcels of property, or the property of particular persons or corporations from

this power to bargain away for an unlimited time the right of taxation, if it exists at all, is limited in reference to the subjects of taxation. In all the discussions of this question in this court, and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can as well exempt persons as corporations. And no hindrance can be seen in the principle adopted by the court to rich corporations, as railroads and express companies, or rich men, making contracts with legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from the burdens of supporting the government. The result of such a principle, under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and cast all the burden of the

support of the government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity. . . . We are strengthened in this view of the subject, by the fact that a series of dissents from this doctrine by some of our predecessors shows that it has never received the full assent of this court." In Ohio, it has been held that the legislature of that State does not possess constitutional authority in conferring special privileges on corporations, to abridge or in any manner surrender any portion of the right of taxation. *Plank R. Co. v. Husted*, 3 Ohio St. 578, and cases cited; *Ib.* 586; *Sandusky City Bank v. Wilbor*, 7 Id. 481; *Skelly v. Jefferson Branch Bank*, 9 Id. 606, reversed *i. Black*. 436. See *Bank of Pa. v. Com.*, 19 Pa. St. 151; *Easton Bank v. Com.*, 10 Id. 442.

¹ *Iron City Bank v. Pittsburg*, 37 Pa. St. 340.

taxation, either for a specified period, or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. When such immunity is conferred, or such limitation prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. But, as already said, before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. The rule of construction in such cases is, that rights, privileges, and immunities not expressly granted are reserved.¹

By the colonial act of Massachusetts of 1650, which is considered as the original charter of Harvard College, taken in connection with the previous acts of 1636, 1640, and 1642, it was ordered that all the lands, tenements, and hereditaments, houses, or revenues appertaining to the president or college, not exceeding the value of £500 per annum, should be from thenceforth freed from all civil impositions, rates, and taxes. It was held that the legislature had not constitutional power to tax the property belonging to the institution within the limits of the grant; but that real estate subsequently acquired would be subject to legislative disposition in regard to taxation after the exemption provided for had been secured.²

In 1758 the legislature of New Jersey and the Delaware Indians agreed to exchange lands. The Indians were to cede all of their land to the province; and the legislature was to purchase and cede to the Indians other land, and it passed a statute declaring that the land so purchased and ceded to the Indians should not thereafter be subject to taxation. In virtue of this act, the convention with the Indians was executed. In 1801 the Indians obtained an

¹ The Delaware R.R. Tax, 18 Wall. 206. ² Hardy v. Waltham, 7 Pick. 103.

act of the legislature authorizing a sale by them of their land, and in 1803 the commissioner under the act conveyed the land to the plaintiff. In 1804 the legislature repealed that part of the act of 1758 which exempted the land from taxation. The land was then assessed, and the taxes demanded, and the Supreme Court of the State held that the repealing act was valid. On a writ of error, this decision was reversed by the Supreme Court of the United States. MARSHALL, C. J., said : "The question is narrowed to the inquiry, whether, in the case stated, a contract existed, and whether that contract is violated by the act of 1804. Every requisite to the formation of a contract is found in the proceedings between the colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, and the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation, and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract. The privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it. The land has been sold with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands with respect to this land in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."¹

¹ State of N. J. v. Wilson, 7 Cranch, 164.

At a very early day, the legislatures of several of the States granted charters of incorporation for banking and other purposes exempting the institutions wholly or in part from subsequent taxation. This practice became at length so common and operated so extensively in withdrawing corporate property from the burdens to which individual wealth was subject, that the powers of the courts were invoked against it. The decisions were not entirely harmonious, but the great weight of authority favored the opinion that, in the absence of any constitutional provision, the legislatures had power to stipulate for the exemption, and that when this was done, the charter was protected by the clause of the Constitution of the United States forbidding the passage of any law impairing the obligation of contracts.¹ In *Seymour v. Hartford*,² it was said by the court : "Whatever might be our opinion upon the question of the exemption of property from taxation, were it an open one, it is now too late to contend that grants or donations for religious or charitable purposes, made under the statute enacted at some period before 1702, which provides that they shall be forever free from taxation, can by its repeal be subject to taxation as if the statute had never existed. It is certainly a very high act of legislative power for one legislature to grant an exemption from all future taxation so as effectually to tie the hands of future legislatures under any and all future emergencies. But this has been held to be properly done ; and it has been sanctioned by the highest judicial authority of the land." Where a State legislature having passed an act exempting a railroad company from taxation until the road was completed and in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years

¹ *Walcott v. People*, 17 Mich. 68. *Pegues*, 16 Id. 244; *Osborne v. Humph-*

² 21 Conn. 481. See *McGee v. rey*, 7 Conn. 335; *Ill. Cent. R.R. Co. Mathis*, 4 Wall. 143; *Humphrey v. v. County of McLean*, 17 Ill. 291.

after its completion, it was held that an ordinance afterward adopted by the State imposing a tax upon the gross earnings of the road before it was completed and in operation or had declared a dividend, was a violation of the contract, and that a levy for its enforcement was illegal, notwithstanding the amount raised was to be applied to the payment of the principal and interest due and to become due upon bonds issued to the company by the State.¹

The constitution of Maryland of 1850 ordained that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time or repealed."² Each of the constitutions of 1864 and 1867 afterward adopted, contained a similar provision. It had become settled law that unless there was a reservation, either in the charter or in a general law or the State constitution, of the right to modify or limit the nature of the contract, the legislature possessed no power to amend or repeal such charter against the consent, or without the default of the corporation judicially ascertained and declared. The object of the foregoing provision of the constitution was to preserve to the State control over its contracts with corporations, and to prevent the grant of corporate powers beyond the interference of the legislature should the public interests at any time require such interference. It constituted, therefore, a condition upon which every charter was granted and held, and qualified to that extent the contract between the

¹ Pacific R.R. Co. v. Maguire, 20 Wall. 36. Where the charter of a bank expressly limited the right to tax the bank to one-fourth of one per cent. on each share of stock for State purposes, it was held a contract between

the stockholders and the State, and that the latter could not authorize a municipal corporation to impose an additional tax. O'Donnell v. Bailey, 24 Miss. 386.

² Const. of Md., art. 3, sec. 47.

State and corporations. It was accordingly held that the legislature could not grant to a corporation immunity from taxation, or any other corporate privilege, beyond the power of a subsequent legislature to repeal or revoke.¹

Where the constitution of a State declared that the property of all corporations for pecuniary profit should be subject to taxation the same as that of individuals, it was held that the following statute was unconstitutional : “ Every railroad company which shall have paid all taxes on gross earnings, shall be released from the payment of all other taxes which may have been levied on the road-bed, right of way, rolling stock, and necessary buildings for operating their road, and no taxes for prior years for State, county, municipal, or any other purpose for which any tax can be levied under the laws of a State shall be collected from any such railroad company on such property.”²

§ 259. Construction of statutes exempting from taxation.—Exemption from taxation is not favored by the courts, and is in general strictly construed. We have seen in the preceding section that courts require it to be expressed in clear and unambiguous language, and to appear indisputably to

* ¹ State v. Northern Cent. R.R. Co., 44 Md. 131. See Miller v. State, 15 Wall. 488.

² City of Davenport v. C. R. Q. & P. R.R. Co., 38 Iowa, 633, COLE, J., dissenting. In a subsequent case in the same court involving a similar question, BECK, J., held that the statute was unconstitutional also on the ground that the taxes due previous to the passage of the act were a vested right which it was not competent for the legislature to impair. City of Dubuque v. Ill. Cent. R.R. Co., 39 Iowa, 56. In Mott v. Pa. R.R. Co., 30 Pa. St. 9, it was held that one legislature had no power to bargain away the right of taxation so as to bind future legislatures,

notwithstanding there were no words in the constitution which expressly declared that the legislature should not relinquish the power to impose taxes upon persons or property, and that such prohibition was not necessarily implied from any of the restrictions imposed on legislative action. Bentham says that “ all laws may be said to be framed with a view to perpetuity ; but perpetual is not synonymous with irrevocable ; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity,—a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded.”

have been within the intention of the legislature, or they have declined to enforce it.¹ In 1804 two townships of land were vested in the Ohio University for the sole use, benefit, and support of the university forever. The same act declared that the land in the two townships, appropriated and vested as aforesaid, with the buildings which were or might be erected thereon, should forever be exempt from State taxation. The Supreme Court of Ohio having ruled that the land was no longer exempt, the decision was affirmed by the Supreme Court of the United States. The court said that the clause declaring the land to be forever exempt must be taken in connection with other parts of the act, and that, when so taken, it seemed clear not to have been the intention of the legislature that the exemption should continue for any longer period than during the time the land should be vested in the corporation in trust for the purposes specified in the act.²

Under a clause in the constitution of a State providing that such property as the legislature may deem necessary for schools, and for religious and charitable purposes, may be exempted from taxation, it is not competent for the legislature to exempt from taxation property owned by educational, religious, or charitable corporations, which is not itself used directly in aid of the purposes for which the corporations were created, but which is held for profit merely, although the profits are to be devoted to the proper purposes of the corporation.³ So, under a statute exempt-

¹ People v. Davenport, 91 N. Y. 574, referring to Providence Bank v. Billings, 4 Pet. 561; Matter of the Mayor, etc., of N. Y., 11 Johns. 77; Buffalo City Cemetery v. Buffalo, 46 N. Y. 506; Chegany v. New York, 13 Id. 220; Sheehan v. Good Samaritan Hospital, 50 Mo. 155; 11 Am. Rep. 412; Orange & Alexandria R.R. Co. v. Alexandria, 17 Gratt. 176; Bridgeport v. New York & New Haven R.R. Co., 36 Conn. 255; 4 Am. Rep. 63; State Protestant, etc., Soc. v. The Mayor, etc., 35 N. J. 157; Paterson v. Society, etc., 4 Zab. 385; Baltimore v. Green Mount Cemetery, 7 Md. 517.

² Armstrong v. Treasurer, 10 Ohio, 235; S. C. 16 Peters, 281. See Commissioners v. Brackenridge, 12 Kansas, 114.

³ Northwestern University v. The People, 80 Ill. 333.

ing from taxation all houses of religious worship, the exemption extends to that part of property which is used as a place of worship, and for purposes connected with it, but not to separate apartments in the same building used for purposes exclusively secular.¹ A statute exempted from taxation "every building erected for the use of any literary, religious, benevolent, charitable, or scientific institution." The third and fourth stories of an edifice were used exclusively for religious purposes, while the first and second stories were rented and the proceeds applied to religious purposes. It was held that so much of the building as was rented was taxable, but that the other part was exempt. The court said: "The meaning of the law is, as applied to religious buildings and furniture, that they must be used directly for sacred and not for secular purposes. It is not enough that the profits or income of the secular uses are to be applied to sacred purposes. When money is made by the use of the building, that is profit, no matter to what purpose that money is applied."² A statute exempted from taxation "the personal property of all literary, benevolent, charitable, and scientific institutions, and such real estate belonging to such institutions as shall be actually occupied by them, or by the officers of such institutions, for the purposes for which they were incorporated." The plaintiff was a professor of mathematics and astronomy in Harvard College, and the house and land which he occupied were the property of the college, but had been let to him at a rent of \$400 a year. It was held that this property was not within the exemption of the statute; that the occupancy of a lessee was not such an occupying as was intended by the statute; but that it would have been otherwise if the building had been erected by the officers of the college, and had been occupied by the plaintiff with the permission

¹ Proprs. of Meeting House in Lowell,
¹ Metc. 538.

² First M. E. Church v. Chicago, 26 Ill. 482.

of the college, and without having any estate therein, or paying any rent therefor.¹ A quarter section of land possessed by a literary and educational institution for the sole purpose of thereafter erecting its permanent buildings thereon, but which was at that time unimproved and unoccupied, was held not exempt from taxation under a clause in a statute exempting from taxation "all property used exclusively for State, county, municipal, literary, educational, scientific, religious, and charitable purposes."²

The charter of a cemetery company provided that all the estate, real or personal, held and actually used by the company for burial purposes, or for the general uses of lot holders, or subservient to burial uses, and which had been plotted and recorded as cemetery grounds, should be exempt from taxation. The property claimed to be exempt consisted of two large tracts, neither of which was included in the land owned and used by the company for burial purposes, although they had been surveyed and plotted. These tracts were separated from the land in actual use by the company, by a public highway. On one of them the company had erected several buildings occupied by men in its employment, and stables where its horses were kept. The other tract was fenced by itself, and had been used by the company as a pasture for its horses; and, as occasion required, sand and mold had been taken from each tract and used on the land in actual use for burial purposes in order to improve the same. It was held that these two tracts were not exempt from taxation.³

The charter of a bank provided that it should pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which should be in lieu of all

¹ Pierce v. Inhabs. of Cambridge, 2 Id. 3; State v. Ross, 4 Zab. 497; Wyman v. St. Louis, 17 Mo. 335; State v. Town Council, 12 Rich. 339.

² Washburn College v. Commissioners, 8 Kansas, 344. See Orr v. Baker, 4 Ind. 86; Meth. Church v. Ellis, 38

³ People v. Cemetery Co., 86 Ill. 336.

other taxes; that the bank might purchase and hold a lot of ground for the use of the institution as a place of business, and sell or exchange the same, and hold such real and personal property as might be conveyed to it to secure debts, and sell and convey such property. The bank purchased with part of its capital stock a lot which, with the improvements thereon, it bought solely as a place of business, but only used the first floor for that purpose, letting the cellar and the second and third stories to other parties for a money rent. It also became the owner in fee of three other lots conveyed, by a debtor of the bank, to a trustee to secure certain loans due to the bank, and bought by the bank at the sale under the trust deed. The purchase was made to save the debt and the lots held for sale as soon as a reasonable price could be obtained. It was held that the exemption from taxation other than the specific tax prescribed only extended to so much of the building as was necessary for the use of the bank and actually so used.¹ Where the exemption from taxation of the property of a railroad company was "the track of the road and the land on which it is constructed," and did not in terms extend to the appurtenances, it was held that the immunity did not

¹ Bank of Commerce v. McGowan, 6 Lea Tenn. 703. See De Soto Bank v. Memphis, 6 Baxter Tenn. 415. An act for completing a railroad provided that "all the real estate held by the company for right of way, for station-places of whatever kind, and for a work-shop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum." It was held that real estate owned and used for other purposes than those specified was not exempt from taxation, and that if land devoted to any one of the uses enumerated was also appropriated to any other purpose, it would become

liable to taxation. Richmond, etc., R.R. Co. v. Com., 76 N. C. 212. The charter of a railroad corporation gave it power to hold real and personal property, and, after providing that it should pay a tax on its capital stock, exempted it from other taxation. It was held that the exemption was limited to such property as was incident and necessary for the railroad, its objects, and uses, and did not extend to all property which the company might choose to purchase and hold on speculation or to meet the exigencies of some future anticipated business. State v. Newark, 1 Dutcher, 315; 2 Id. 519; State v. Mansfield, 3 Zab. 510.

include the depots, engine-houses, turn-tables, car-houses, and other buildings and erections.¹

A statute which exempts all of the property of a railroad company from taxation, includes the real and personal estate of the company required for the successful prosecution of its business and also its franchise.² The word "necessary" in a statute exempting property from taxation is not contradistinguished from the word "convenient." Power necessary to a corporation does not mean simply power which is indispensable, but that which is obviously appropriate to carry into effect the franchise granted.³ The charter of a railroad company provided that "the said corporation may build bridges, fix scales and weights, raise embankments, or make any other works necessary for the construction, use, or enjoyment of the said railroad, and may also enter upon said road and take possession of and use any materials necessary therefor." The same act provided that the corporation should pay into the treasury a tax of one-half of one per cent. upon its capital stock, and that no other tax should be imposed upon the company. It was held that so much of a farm as was useful on account of its gravel in the maintenance of the railroad and a branch railroad connecting the farm with the main track were exempt from taxation.⁴ A statute required railroad

¹ Portland, etc., R.R. Co. v. Saco, 60 Me. 196.

² Wilmington R.R. Co. v. Reid, 13 Wall. 264; Gardner v. State, 1 Zab. 557; State v. Commissioners, 3 Id. 510; State v. Flavell, 4 Id. 370; State v. Ross, Ib. 497; State v. Blurdell, Ib. 403; State v. Collector, etc., 2 Dutcher, 519; State v. Collector, 5 Id. 541; Cook v. State, 4 Vroom, 475.

³ State v. Hancock, 35 N. J. 537.

⁴ Ibid. As a general proposition, exemption of the capital stock of a corporation from taxation exempts the

property in reference to which the stock exists, for the reason that the property is the representative of the stock and the stock the representative of the property. When, therefore, there is a simple declaration by the legislature that the capital stock of a corporation shall be exempt, an exemption of one is the exemption of the other. If, however, an act provides that while the capital stock shall be forever exempt the property shall be exempt for thirty-five years, the necessary inference is that after the expira-

companies of the State annually to make return and pay to the State treasurer a sum equal to three per centum of the gross earnings of the roads owned or operated by them respectively within the State for the year preceding the making of such return, the payment of which sum was declared to take the place and be in full of all taxes of every name and kind upon said roads or other property belonging to said companies or the stock held by individuals therein, except special assessments for local improvements within cities and incorporated villages. A subsequent statute was as follows: "The track, right of way, depot, grounds, and buildings, machine-shops, rolling stock, and all other property necessarily used in operating any railroad in this State belonging to any railroad company are hereby all and singular declared to be, and they shall henceforth remain exempt from taxation for any purpose whatsoever, and it shall not be lawful to assess or impose taxes upon any property before named." It was held that a hotel and premises used exclusively for the convenience and accommodation of travelers and guests arriving and departing by a railroad must be deemed "property necessarily used in operating the railroad" within the meaning of the statute.¹ Where the bed, berm bank, toll-houses, and collectors' offices, the constituent parts of and incident to a canal belonging to an incorporated company, could not be taxed under the statute, it was held that the exemption extended to a toll-house erected for the accommodation of the collector, although the building was occupied by him and his family as a residence and was three stories in height.² Where an act for the raising of taxes excepted manufacturing corporations within the State, it was held that the

tion of thirty-five years the property may be taxed. Atlantic & Gulf R.R. Co. v. Allen, 15 Fla. 637.

¹ Milwaukee & St. Paul R.R. Co. v. Crawford County, 29 Wis. 116.

² Schuylkill Nav. Co. v. Commissioners, 11 Pa. St. 202. See Ridge Turnpike Co. v. Stoever, 6 Watts & Serg. 378; Lehigh Coal & Nav. Co. v. Northampton Co., 8 Id. 334.

exception embraced all corporations, the chief and principal business of which was the manufacture and sale of artificial products, and that it therefore included an incorporated company engaged in manufacturing and supplying illuminating gas.¹

§ 260. In case of consolidation.—Where two railroad companies, the one exempt from taxation and the other not exempt, are authorized to unite, each after consolidation has all the rights, and is subject to all the liabilities, that were originally conferred upon it. While one, therefore, continues exempt from taxation, the power of the legislature to tax the franchises, property, and income of the other remains unimpaired.² A corporation was composed of several railroad companies previously chartered by the States of Maryland, Delaware, and Pennsylvania, two of which were the Baltimore and Port Deposit Railroad Company, and the Delaware and Maryland Railroad Company. The charter of the former company did not exempt it from taxation. The act which incorporated the Delaware and Maryland Company provided that shares in that company should be deemed and considered personal estate, and

¹ Nassau Gas Light Co. v. Brooklyn, 89 N. Y. 409. A gas light company is not a *quasi* public corporation within the principle on which turnpike, railroad, canal, and other similar corporations established for the convenience and accommodation of the public are held to be exempt from ordinary taxation in the cities or towns where they own property which is held and used by them for purposes connected with or essential to the due exercise of their corporate rights and duties. Com. v. Lowell Gas Light Co., 12 Allen, 75. Where the stock in trade and other personal property of a manufacturing corporation, which were not taxable under the statute, were taxed, it was

held that the corporation was not estopped to maintain an action to recover back the amount paid by the fact that the corporation sent in a statement of its taxable property including the property exempt. Dunnell Manf. Co. v. Inhabs. of Pawtucket, 7 Gray, 277.

² Tomlinson v. Branch, 15 Wall. 460; Delaware R.R. Tax Case, 18 Id. 206; Cent. R.R., etc., Co. v. Georgia, 92 U. S. 665; Southwestern R.R. Co. v. Georgia, Ib. 676 *note*; Branch v. City of Charleston, Ib. 677; Chesapeake & Ohio R.R. Co. v. Virginia, 94 Id. 718. See Railroad Co. v. Maine, 96 U. S. 499; State v. Maine Cent. R.R. Co., 66 Me. 488.

be exempt from any tax or burden "except upon that portion of the permanent and fixed works which might be in the State of Maryland." It was held that each company was liable to be assessed in the hands of the new company the same that it would have been if it had not been consolidated.¹ An act was passed by the legislature of South Carolina in 1828 providing that during the first period of thirty-six years, the stock of the South Carolina Canal and Railroad Company, which had been chartered the previous year, and the real estate that might be purchased by the company and connected with and subservient to the works authorized, should be exempted from taxation. Under this charter the company constructed a railroad, and the thirty-six years of exemption from taxation expired in 1869. In 1843 the company was consolidated with the South Carolina Railroad Company by an act of the legislature as follows: "Whenever the written consent of all the stockholders of the South Carolina Canal and Railroad Company shall have been obtained, the said South Carolina Canal and Railroad Company shall be merged in the said South Carolina Railroad Company, and the said South Carolina Railroad Company shall be liable for all the debts and contracts of the said South Carolina Canal and Railroad Company; and the stock and property of the said South Carolina Railroad Company shall be subject to the same liens and charges to which the stock and property of the said South Carolina Canal and Railroad Company may be liable, and in the same relative order in which the said liens and charges now stand." It was contended that by the

¹ Phila. & Wilmington R.R. Co. v. Maryland, 10 How. 376. The meaning of the law was held to be that whatever privileges and advantages either of the former companies possessed, should in like manner be held and possessed by the new company to the extent of the

road which the former companies had respectively occupied before the union; that each should occupy the same position and have the same power, rights, and privileges it had enjoyed in the portion of the road which had previously belonged to it.

consolidation the property of the South Carolina Canal and Railroad Company was held by the South Carolina Railroad Company with all the rights and privileges of its own charter attaching, including the right to be exempt from taxation. It was decided that the two united lines of road were held with the rights and burdens originally belonging to each, and that a perpetual exemption from taxation in the charter of one would not extend to the property of the other unless there were express words, or necessary intendment to that effect.¹

§ 261. In case of sale of corporate property.—Immunity of the property of a corporation from taxation is not itself a franchise which passes as such without other description to a purchaser of the property, or under a mortgage foreclosure, the immunity being a mere personal privilege of the corporation.² A railroad company, the charter of which exempted it from taxation, became indebted to the State for bonds taken from the State by way of loan, the acceptance of which was declared by statute to operate as a mortgage of the road and its appurtenances; and, in case of default, the governor was authorized to sell the road and its appurtenances at auction, or to buy in the same. Afterward a new State constitution provided that no property of any corporation should be exempt from taxation. The company being in default, the State lien was foreclosed,

¹ Tomlinson v. Branch, 15 Wall. 460. Where two railroad companies, which were exempt from taxation, were consolidated, the act authorizing the consolidation providing that the new corporation should have the franchises, privileges, and immunities which the companies held by their original charters, it was decided that a subsequent act of the legislature declaring that the property of all railroad companies in the State should be taxed, did not im-

pair the obligations of the contract contained in the charter of the consolidated company. Railroad Co. v. Georgia, 98 U. S. 359. See Tennessee v. Whitworth, 117 U. S. 129.

² Morgan v. Louisiana, 93 U. S. 217; West Wisconsin R.R. Co. v. Trempealeau County, Ib. 595; Nilson v. Gaines, 103 Id. 417; Railroad Cos. v. Gaines, 97 Id. 697; 3 Fed. Rep. 266; 2 Flippen, 621. See Humphrey v. Pegues, 16 Wall. 248.

the State buying in the road and afterward selling it to persons who organized themselves into a new corporation under a statute which provided that the purchasers should have all the rights, franchises, privileges, and immunities which were enjoyed by the former company. It was held that the inhibition of the constitution applied in all its force against the renewal of an exemption, equally as against its original creation, which the legislature could not disregard in providing for the sale of the property, and that therefore the immunity from taxation previously granted no longer existed.¹ In Virginia, a statute exempting from the payment of taxes the property of orphan asylums, was held not to include a tax on a devise or bequest to such an institution. The court

¹ *Trask v. Maguire*, 18 Wall. 391. The act incorporating a railroad company authorized the company to lay out its road not exceeding five rods in width through its whole length, and for the purpose of cuttings, embankments, and procuring stone and gravel, to take as much more land as might be necessary for the proper construction and security of the road, and to purchase and hold land, materials, engines, cars, and other necessary things for the use of the road, and for the transportation of persons, goods, and merchandise. The act further provided that the State might, after a certain time, and upon certain terms, purchase the railroad and all the franchise, property, rights, and privileges of the corporation. It was held that the company was not liable to taxation for land of the width of five rods located for the road, nor for any buildings or structures erected thereon, provided they were reasonably incident to the support of the railroad, or to its proper or convenient use for the carrying of passengers and the transportation of com-

modities, and that this included engine and car houses, depots for the accommodation of passengers, and warehouses for the convenient reception, preservation, and delivery of goods carried on the road. SHAW, C. J., said: "The company have not the general power of disposal incident to the absolute right of property; they are obliged to use it in a particular manner and for the accomplishment of a well-defined public object; they are required to render frequent accounts of their management of this property to the agents of the public; and they are bound ultimately to surrender it to the public at a price and upon terms established. Treating the railroad then as a public easement, the works erected by the corporation as public works intended for public use, we consider it well established that, to some extent at least, the works necessarily incident to such public easement are public works, and as such exempted from taxation." *Inhabs. of Worcester v. Western R.R. Corp.*, 4 Metc. 564.

said that it was illogical and unreasonable to suppose that because the property of such institutions, after it had been acquired, was exempted from taxation, that therefore they would be relieved from paying a premium or tax on the civil right or privilege of acquiring property by devise.¹

§ 262. Increase of taxation.—The right of a State to impose an increased tax, rate, or imposition, in future, cannot be taken away by a mere implication arising from a direction to pay a certain sum.² A provision, therefore, in an act of the legislature that a corporation shall pay annually a specified tax, does not prevent a subsequent legislature from imposing an additional or different tax upon the corporation.³ The Easton Bank had been chartered under a general law which prescribed the payment of taxes on its dividends at a fixed rate. A subsequent statute increased that rate, and it was contended that the limitation in the original act created a contract on the part of the State that no additional tax should be laid, and that, therefore, the later act impaired the obligation of the contract. It was held, however, that the designation in the original act was simply a declaration of the tax then to be paid by the bank, and not an agreement that the tax should not be increased during the existence of the charter. The court said that “to deduce from premises so insufficient, a consequence of such magnitude, would be a violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the State.”⁴

¹ *Miller v. Com.*, 27 Gratt. 110. The property of a corporation which is placed in the hands of a receiver by a court for the purposes of a suit pending therein, is not thereby rendered exempt from the operation of the tax laws of the State within the jurisdiction of which such property is situated.

Stevens v. N. Y., etc., R.R. Co., 13 Blatchf. 104.

² *Union Passenger R.R. Co. v. Phila.*, 83 Pa. St. 429.

³ *The Delaware Railroad Tax*, 18 Wall. 206.

⁴ *Com. v. Easton Bank*, 10 Pa. St. 451. In Tennessee it was stipulated

§ 263. When exemption may be revoked.—Where an act exempting property from taxation is founded on no consideration, it is not a contract, but a nude pact, and the promise of a gratuity which may be kept, changed, or recalled at pleasure.¹ A joint committee of the house of representatives and council of New Hampshire, appointed to consider what was requisite to be done concerning the lands which were granted and conveyed to Dartmouth College, reported that no lands belonging to the college should be sold for taxes, provided the trustees gave notice seasonably to the selectmen of each town respectively what lands they had in such town; and that the taxes for the present should be charged to the State. It was voted and resolved that this report be accepted, and that all persons take notice and govern themselves accordingly. It was held that when the legislature provided by general laws for assessments, and for the collection of taxes assessed in acts subsequent to the adoption of the constitution, this temporary provision for the charging of the taxes to the State must be considered at an end.² In the year 1833 the legislature of Pennsylvania passed an act which recited that "Christ Church Hospital in the city of Philadelphia had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a

in the charter of a bank that in consideration of the privileges granted, the bank should pay to the State annually one-half of one per cent. on the amount of the capital stock paid in by the stockholders other than the State. Subsequently, the constitution of the State being amended, it was provided that all property, excepting such corporations as had heretofore been, or might thereafter be exempted from taxation in their respective charters of incorporation, should be taxed five per cent. It was held that as the bank in question had purchased from the State for a

valuable consideration the right to use its capital stock in banking operations, the State had no power, without the consent of the bank, to impose any additional burthen by way of taxation on the enjoyment of this right; but that the stock of resident owners might be taxed like other property at its cost value. *Union Bank v. The State*, 9 Verg. 490.

¹ *Lord v. Litchfield*, 36 Conn. 116; *Tucker v. Ferguson*, 22 Wall. 527; *Wisconsin R.R. Co. v. Supervisors*, 93 U. S. 595.

² *Brewster v. Hough*, 10 N. H. 138.

public charge ; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burdens of taxes, its means are curtailed and its usefulness limited"; it is enacted that "the real property, including ground rents, now belonging and payable to Christ Church Hospital in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." It was held that as the concession of the legislature was spontaneous, and no service or duty or other remunerative condition imposed on the corporation, it might be revoked.¹ A statute which offered a premium of ten cents a bushel on every bushel of salt made from water obtained by boring within the State, and exempted from taxation the land on which the work was done, was held not an irrevocable contract, but that the statute could be repealed, notwithstanding parties had embarked in the business which the statute sought to encourage.²

¹ Christ Church v. Phila., 24 How. ² Salt Co. v. East Saginaw, 13 Wall. 300, affirming S. C. 24 Pa. St. 229. 373.

CHAPTER XV.

CORPORATE LIABILITY ON CONTRACTS.

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§ 264. **In general.**—The liability of a corporation on its contracts depends upon the principle which governs a partnership, that is, upon the fact that the contract is one into which the corporation could enter, and which has actually been made by the corporation or by its constituted agents.¹ Corporations are bound by all contracts, whether

¹ “Whatever be the nature of the partnership, each member has an implied authority to bind the firm for certain purposes only. If he goes beyond that authority, if, purporting to act in behalf of the firm, he enters into engagements alien to the objects of the firm or exceeding his powers, the firm will not be responsible for those engagements, even though they have derived advantage therefrom, unless indeed they have ratified the same. This non-liability exists as strictly in chancery as at common law. Thus, in *Fisher v. Taylor*, 2 Hare, 218, it was laid down that the implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm ; and therefore a party advancing money to one partner knowing that it was for the latter purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with

express or implied, whether by bond, bill of exchange, or negotiable note, entered into in the usual and necessary course of their legitimate business, except where there is a statutory prohibition,¹ without any express power in the charter for that purpose.² In a suit by a bank as the second indorsee of a promissory note against the maker, made payable to an insurance company or order, and indorsed by the president of the company, upon the question whether the transfer of the note was made by sufficient authority, an exception to the following instruction to the jury was overruled: That if they should find that for a succession of several months prior to the transfer it was the usage of the company to borrow money for the purposes of its legitimate business, and to negotiate its notes in order to raise money for such purposes, and the money so borrowed was so used, and such notes uniformly indorsed in the same form as the note in suit, the evidence was sufficient to warrant the jury in finding that the indorsement of the note sued on was by sufficient authority.³

their express or actual authority. It applies alike to money borrowed on behalf of the firm, and to materials supplied to and work done for the firm under similar circumstances. It applies *a fortiori* to contracts relating to matters not within the partnership purposes. In considering this principle with reference to corporations, it is only necessary to bear in mind the meaning of the doctrine of *ultra vires*. Corporations can be bound, whether by their own proceedings or those of their agents, within certain limits only. Outside those limits they are not bound. Neither at law nor in equity will the other contracting party obtain any redress in any form of suit upon the engagement itself, from the corporation, whatever be the fraud, or however unjust the refusal of such redress."

Green's Brice's Ultra Vires, 2d Am. Ed. 715, 716.

¹ White Water Valley Canal Co. v. Vallette, 21 How. 414; McMasters v. Reed, 1 Grant's Cas. 36; Sturtevant v. City of Alton, 3 McLean, 393; Legrand v. Mercantile Assoc., 80 N. Y. 638; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Blunt v. Walker, 11 Wis. 334; Old Colony R.R. Co. v. Evans, 6 Gray, 25; New England Fire Ins. Co. v. Robinson, 25 Ind. 536; Kelly v. Board of Public Works, 75 Va. 263; Jones v. Nat. Building Assoc., 94 Pa. St. 215.

² Moss v. Averill, 10 N. Y. 449, and cases cited. See *In re Agra & Masterman's Bank*, L. R. 2, Ch. 391.

³ Marine Bank of N. Y. v. Clements, 6 Bosw. 166.

§ 265. Presumption in favor of validity of contract.—Where power to make commercial paper is a necessary incident to the business which the corporation is created to transact, the executive officers of the company are presumed to act in relation thereto within the scope of their authority, and every intendment will be made to support such paper especially when made by the financial officer of the company.¹ In a case in Alabama it was said that the success of manufacturing and other like enterprises would be so greatly impeded and embarrassed without the capacity to contract debts, borrow money, and make and receive bills of exchange and promissory notes, these powers would be in-

¹ *In re Gt. Western Tel. Co.*, 5 Biss. 363. See *Gelpecke v. City of Dubuque*, 1 Wall. 175; *Commrs. of Knox County v. Aspinwall*, 21 How. 539; *Farmers' Loan & Trust Co. v. Curtis*, 3 Seld. 466; *Stoney v. Am. Life Ins. Co.*, 11 Paige Ch. 635; *Morris Canal & Banking Co. v. Fisher*, 1 Stockt. Ch. 667; *Wilmarth v. Crawford*, 10 Wend. 343; *Allegheny City v. McClurkan*, 14 Pa. St. 83. An insurance company was authorized by its charter "to make insurance upon vessels, goods, or merchandise, freight, bottomry, respondentia, and to do and perform all matters and things for the well-being of the corporation not contrary to the provisions of this act." It was further provided that all policies of insurance and other contracts authorized by the act which should be made or entered into by the company should be subscribed by the president and attested by the secretary. It was held that no power was given to the company to execute promissory notes, or to borrow money to pay liabilities incurred in the necessary prosecution of its business; and that if there were any circumstances which rendered such acts valid, it was incumbent on the party claiming

the benefit of them to show their validity. *Bacon v. Miss. Ins. Co.*, 31 Miss. 116.

A railroad company was incorporated without express power to execute bills and notes; but only to give such paper when necessary or proper in carrying through the main undertaking. The company therefore had no power to execute accommodation paper, or paper to aid an undertaking not contemplated by its charter, and such paper would be void. A bill or note executed within the power of the corporation, but by an abuse of the power in the particular instance, would, if governed by the law merchant, be valid in the hands of a *bona fide* holder; but when executed entirely without the corporate power, it would not, if indeed there could be a *bona fide* holder of such a bill. *Smead v. Indianapolis, etc., R.R. Co.*, 11 Ind. 104.

Where the charter of a corporation does not confer upon it power to emit or put in circulation notes, bills, or checks, of the character of bank bills, it is nevertheless liable to pay for the labor and cost of making them. *Underwood v. Newport Lyceum*, 5 B. Mon. 129.

ferred where there was no prohibition to the contrary in the charter of the corporation ; the presumption being in favor of the validity of notes made by such a corporation, and that they were made in the lawful course of its business.¹ In an action upon a bill of exchange against a banking association, it was said : "Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show for what the particular security was given, if there is nothing on the face of the instrument itself to create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose rather than for one which was unauthorized and illegal."² A corporation had no general authority to make loans and invest its capital on bond and mortgage ; but it could execute trusts, and invest trust funds in securities of that nature. On a bill filed by a corporation to foreclose a mortgage given to it by the defendant, it was held by the assistant vice-chancellor, and also by the New York Court of Appeals, that where a loan by such a corporation was contested by the borrower on the ground of want of power to make it, it was incumbent on him to show that the loan was not made in the proper exercise of the powers

¹ Oxford Iron Co. v. Spradley, 46 Ala. 98, referring to 2 Cowen, 664. Where, however, a company was incorporated to conduct the business of cutting, sawing, and dressing stone, and the by-laws authorized the secretary to accept bills of exchange in the prosecution of the business of the company, it was held that the corporation did not have such an unqualified authority to draw, indorse, or accept bills of exchange, that a third party might, without inquiry, rely upon its drawing, indorsement, or acceptance, and claim to be regarded as a *bona fide* holder for value, protected against any inquiry into the consideration, or into the actual authority of the officer or agent, or

whether in truth the note or bill was issued for the proper purposes of the corporation. Farmers' & Mechanics' Bank v. Empire Stone Dressing Co., 5 Bosw. 275.

² Safford v. Wyckoff, 4 Hill, 442, per WALWORTH, Chancellor. A declaration alleged that a corporation made its promissory note in writing, and ten days after the date thereof promised to pay to the plaintiff, etc., it was held that as the word "thereby" was omitted in setting forth the promise, there were no words from which it could even be implied that the promise was in the note. Montague v. Church School Dist. No. 3, 34 N. J. 218.

expressly granted.¹ In an action against a joint stock company on a bond signed by two directors under the seal of the company, whereby the company acknowledged itself bound to the plaintiff in £2,000, it appeared that the bond was given to secure to the plaintiff, who was a banker, such sum as the company should, to the amount of £1,000, owe plaintiff on the balance of an account current, from time to time, and for indemnifying plaintiff to that amount for losses incurred by reason of the account. The deed of settlement organizing the company allowed the directors to borrow on bond such sum or sums of money as should from time to time by a resolution passed at a general meeting of the company be authorized. The directors accordingly borrowed on bond the amount for which the representative of the company was sued; but the plea set up that there had been no general resolution of the company authorizing the making of the bond. It was held on demurrer that the plaintiff was entitled to judgment. The court said that the dealings with such companies were not like dealings with other partnerships; that parties dealing with them were bound to read the statute and deed of settlement; and that the lender finding on reading the deed of settlement that there was no prohibition of borrowing, but permission to do so on certain conditions, and that the authority might be made complete by a resolution, had a right to infer that such a resolution was passed.² In an action on a policy of insurance it appeared that the deed of settlement of the company pro-

¹ Farmers' Loan & Trust Co. v. Perry, 3 Sandf. Ch. 339; 3 Comst. 470. Where in an action on corporate bonds the complaint set out the bonds, averred that the defendant was a corporation, that it made and delivered the bonds for a good consideration under an ordinance passed by the proper agents of the corporation for that purpose, and that the defendant had failed to pay, it was held sufficient *prima facie* to show

liability on the part of the corporation, without setting out the ordinance which empowered the corporate authorities to make the contract, or the vote or other proceedings, or giving any further description of the agents. Underhill v. Trustees, 17 Cal. 172.

² Royal British Bank v. Turquand, 5 Ell. & Bl. 248; 6 Id. 327; 85 Eng. Com. L. 246; 8 Id. 325.

vided that the common seal should not be affixed to any policy except by the order of three directors, signed by them and countersigned by the manager, and that every policy should be given under the hands of not less than three directors, and sealed with the common seal. The policy in question was sealed with the common seal and signed by three directors, one of whom was manager ; but there was no previous order as required. It was contended in behalf of the defendant that the previous order was a condition precedent to the power of the directors to affix the seal to the policy ; that the directors were agents with limited authority ; that those who contracted with them had notice of the limits because the statute conferred the authority subject to the provisions of the act and of the deed of settlement which was registered for public inspection ; and that the shareholders as the principals had a right to repudiate every policy not executed in pursuance of the authority given to the directors. The Court of Queen's Bench held that a person receiving a policy in good faith, had a right to presume that the directors who signed it had done their duty, and that they had the preliminary order for executing it, and therefore it was binding on the company.¹

Although actual work in the construction of a railroad was not commenced until several months after the appointment of the plaintiff as superintendent of the company, yet he was actively and efficiently employed during the interval in the interest of the company in important business preliminary to the construction of the road. It was held that while the work which he performed might not be technically within the line of the superintendent's duty, yet being work which he might be directed as the servant of the company to do, and having performed the labor at the company's request while holding the office, it would be presumed that he acted in an official capacity ; and that testimony as to

¹ Prince of Wales Co. v. Harding, Ell. Bl. & Ell. (96 Eng. Com. L.) 183.

conversations between him and the acting directors of the company during the period of his employment, was admissible to show his dissent at that time from the amount of salary proposed by certain of the directors, and that it was not then considered by him as a stipulated sum.¹

To entitle a director to receive compensation, it must be provided by the by-laws, or by a resolution of the directors spread on the minutes of their proceedings, and fixed before the services are rendered.² But when a director performs duties outside of those devolving upon him as a director under an appointment by a resolution of the board, he will be entitled to compensation.³

§ 266. Where the corporation has been benefited by the contract.—A corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will afford relief, or a proceeding in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate power of the corporation.⁴ Where a note is given by the president of a corporation individually for borrowed money, which note is indorsed by the corporation, and the loan is in fact made to it; or the lender is induced to believe by the agent of the corporation that the transaction was with the corporation in a matter within its legiti-

¹ Bee v. San Francisco, etc., R.R. Co., 46 Cal. 248. Lafayette, etc., R.R. Co., 68 Ill. 570. See Levisee v. Shreveport City R.R. Co., 27 La. Ann. 641; European, etc.,

² Dustin v. Imperial Gas Co., 3 Barn. & Adol. 125; New York, etc., R.R. Co. v. Ketcham, 27 Conn. 175; Am. Cent. R.R. Co. v. Miles, 52 Ill. 174. ⁴ Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. R. 504; Woodruff v. Erie R.R. Co., 93 Id. 609.

³ Shackelford v. New Orleans, etc., R.R. Co., 37 Miss. 202; Cheeney v.

mate business, the corporation is liable.¹ If a corporation should without a vote introduce a usage and practice in the transaction of business different from that prescribed by law, it would be liable. For though such conduct might be improper in itself, yet the corporation could not take advantage of its own wrong to avoid its contracts. It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge and by the consent of the corporation.² Where a corporation having made its promissory note for a large sum in order to raise money to pay its indebtedness and enable it to prosecute its business, the directors indorsed the note, and, to secure themselves, took from the company a mortgage of nearly all of its property, it was held that the corporation, after receiving and using the money, raised upon the credit of the security, was not in a condition to claim that the security was unauthorized and void.³ A corporation cannot defend an action for value received by it on its resolution or request, and used by it in its business, on the ground of irregularities or defects in the corporate organization, failure to file the certificate required by law, or that the certificate filed did not authorize the corporation to obtain money for that particular purpose, though used by the corporation to carry out the general purposes of its creation.⁴ In an action by stockholders of a manufacturing corporation to set aside a mortgage given upon its land on the ground that a large portion of the sum secured by the mortgage was for an alleged debt incurred by the corporation on account of an illegal and fraudulent purchase, and that the written assent of stockholders owning at least two-thirds of the capital stock was not first ob-

¹ *Central Bank v. Empire Stone Co.*, 50 Conn. 597. See *Reichwald Dressing Co.*, 26 Barb. 23. ² *Bulkley v. Derby Fishing Co.*, 2 Conn. 252.

³ *v. Commercial Hotel Co.*, 106 Ill. 439.

⁴ *Merrick v. Reynolds Eng., etc., Co.*, 101 Mass. 381.

⁵ *Thompson v. Aetna Axle & Spring*

tained and filed in the county clerk's office, as required by the statute, the referee found that the mortgage was given and taken in good faith, and that it was free from fraud; that the corporation received in cash the entire amount secured; that the mortgage was intended to promote the interests of the corporation, and that such interests were not injured by it. There was no proof or finding by the referee, or request to find, as to the obtaining of the requisite consent of the stockholders. It was held that such assent was to be presumed after judgment of foreclosure, the burden of impeaching the mortgage and judgment being upon the plaintiffs; and that if they claimed that the mortgage was not given to secure debts of the corporation, or used for that purpose, they should have proved it.¹ A bill in equity was brought for the purpose of enjoining the prosecution of a suit upon certain promissory notes given by a corporation, and also to cancel certain other notes not in suit. It appeared that various persons associated themselves in Chicago, and filed articles of organization under the general incorporation law of the State by which they became incorporated, under the title of "The North Star Gold and Silver Mining Company." The statute of the State required the certificate to specify the town and county in which the operations of a company thus incorporated were to be carried on, which the certificate specified as the city of Chicago, county of Cook, and State of Illinois. It further appeared that the corporation was engaged in mining in Colorado, and in the prosecution of the work borrowed large sums of money, for which most of the notes were given. It was not claimed that the notes were not given for a full and fair consideration, but their cancellation was sought on the ground that they were given to enable the corporation to prosecute a business beyond the

¹ Denike v. New York, etc., Co., 80 N. Y. 599. See Thompson v. Lambert, 44 Iowa, 239.

limits of the State, which by the terms of the certificate it had no power to do, and that this purpose was known to the lenders of the money. The court in sustaining a demurrer to the bill held that as the corporation had received and used the money for a purpose which, whether *ultra vires* or not, was the sole one for which the corporation was organized, justice required that the money should be repaid.¹ Where a corporation borrows money which is required and used to fulfil the objects of the charter, the corporation will be liable for its repayment, though a different method of raising funds for the corporate purposes is provided by law. A school district, having contracted debts to a considerable amount in building a school-house, and for other school purposes, and for expenses incurred in certain actions in which the district was concerned, hired of several persons money and gave its promissory notes for the same, and applied the money to the payment of the debts. It was held that the notes were valid and binding upon the district notwithstanding the school act did not provide any other mode of raising money than by a tax upon the ratable property of the district.²

Although the president of a corporation has no power, merely as president, to bind the corporation by any act of his outside of his official duties, yet the corporation will be bound by his unauthorized acts if it subsequently ratifies them, or so conducts itself with reference to them as that it ought to be estopped from denying his authority, and generally the doctrine of estoppel will apply whenever the corporation receives and retains the benefit of the contract.³ The board of directors of a railroad company relinquished to the president for a period of three years the exclusive

¹ Bradley v. Ballard, 55 Ill. 413.

way Comp. v. McCarthy, 96 U. S.

² Clarke School Dist. No. 7, 3 R. I. 199. 258; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Whitney Arms Co. v. Bar-

³ Perry v. Simpson Waterproof Manuf. Co., 37 Conn. 520. See Rail- low, 63 N. Y. 62; Hurd v. Green, 17 Hun, 327; Howe v. Keeler, 27 Conn. 538.

management of the business of the corporation, allowing him, at his own discretion, to employ and pay the workmen constructing the road ; to purchase and lay the iron constituting the track ; to borrow money in large and small sums, giving the notes or bills of the corporation as well as other securities therefor ; to purchase locomotives and cars and to put them in use on the road, paying for them in like bills and notes ; and, at the expiration of the time, the board of directors took possession of the road and of all the property thus procured by the president, without questioning the manner in which it had been obtained. In an action against the company on a bill of exchange given by the president during the time he had the sole control of the affairs of the company in payment for a locomotive and tender constructed by the payees named in the bill, who indorsed it to the plaintiff, it was held that the plaintiff was entitled to recover.¹

The stockholders of a corporation have no right to remain silent and permit the directors to make contracts with third parties and receive the benefits flowing from such contracts, and then, when a court of equity is called upon to enforce a repayment of the money, to take shelter behind unauthorized acts of those who have been intrusted with the management of the affairs of the corporation.² On a bill to foreclose a mortgage given by a corporation, the defense was that the persons who executed the mortgage were not directors of the corporation or authorized to mortgage the property. It was held that as the mortgage was executed by the corporation in the mode prescribed by its charter for the express purpose of securing the payment of a loan, the corporation, after receiving the money, could not avoid liability by questioning the authority of the persons making the loan.³ In many instances a court of

¹ Olcott v. Tioga R.R. Co., 27 N.Y. 546.

² Ottawa Northern Plank R. Co. v.

³ Aurora Agr. & Hort. Soc. v. Pad-
dock, 80 Ill. 263. Murray, 15 Ill. 336.

equity will refuse to interfere with a corporation at the instance of a stockholder in respect to an unauthorized contract which has been fully executed, when, if the same stockholder had applied in season for an order to restrain the execution of the contract, the court might have felt bound to grant the relief prayed for, especially where the petitioner has stood by and allowed the alleged illegal transaction to be consummated, and permitted or induced others to become interested in the corporation upon the supposition that the existing state of things is legal and proper.¹ Where a bill was filed by a stockholder of an incorporated company to enjoin the collection of a note given for money which the company had used for a purpose not authorized by its charter, the purpose for which it was to be used being known to the lender of the money at the time the loan was made, it was said by the court: "While courts are inclined to maintain with rigor the limitation of corporate action whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of its charter, they are equally inclined on the other hand to enforce against it contracts, though *ultra vires*, of which it has received the benefit."²

¹ Terry v. Eagle Lock Co., 47 Conn. 141.

² Bradley v. Ballard, 55 Ill. 413. See Episcopal Charitable Soc. v. Episcopal Church in Dedham, 1 Pick. 372; Zabriskie v. Hackensack & N. Y. R.R. Co., 18 N. J. Eq. (3 C. E. Green) 178; Amerman v. Wiles, 24 Id. (9 C. E. Green) 13; Germantown Farmers' Ins. Co. v. Dhein, 43 Wis. 420; Hall Manf. Co. v. Am. R.R. Supply Co., 48 Mich. 331; Kitchen v. St. Louis, etc., R.R. Co., 69 Mo. 224; Union Nat. Bank v. Hunt, 76 Id. 439; Allen v. Freedman's Savings & Trust Co., 14 Fla. 418; Oil Creek, etc., R.R. Co. v. Pennsylv. Transp. Co., 83 Pa. St. 160.

The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. The converse of this proposition is equally true, that, where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant who has enjoyed its benefits cannot set up the defense of *ultra vires*. Wright v. Pipe Line Co., 101 Pa. St. 204; Swan v. Scott, 11 Serg. & Rawle, 164. A party insured having sustained loss was induced to compromise his claim against the company in consequence of the misrepresentation of its

§ 267. Official services.—A director of a corporation is not entitled to payment on a *quantum meruit* for the performance of services previously rendered by him in the line of his duty as director.¹ In *Loan Assoc. v. Stonemetz*,² a vote having been passed by the directors of a loan association to pay the chairman of the committee on short loans \$200 for his services already rendered, it was held that the

principal officer. It was held that the compromise must be set aside, and that the party was entitled to recover on his policy in a court of equity. *Merrick v. Lamar Ins. Co.*, 74 Ill. 404. An insurance company issued a policy of insurance to B. on his dwelling-house, the loss to be payable to H. as his mortgage interest might appear. The policy contained a condition that if the property insured should be sold or conveyed, or if the interest of the insured therein should be changed in any manner, whether by the act of the insured or by operation of law, the policy should be void until the written consent of the company was obtained. The company failed and a receiver was appointed. B. died intestate without having obtained the consent of the company to a change of interest in the property, and the dwelling-house was thereafter destroyed by fire. It was held that the death of B. caused a change of interest which avoided the policy; that if consent could not be obtained either of the company or the receiver, it should be treated as a case where consent was refused, and the company was bound to repay simply the unearned premium on the policy. *Hine v. Woolworth*, 93 N. Y. 75.

A deviation from the described course of employment of an insured vessel, unless compelled by necessity at any time after the liability under which the policy attaches, constitutes a defense to an action thereon for a subsequent loss, however slight or harmless the devia-

tion may appear to be. When the policy by the use of the terms "at and from" the port specified covers the period of waiting, it is not material whether a deviation occurs during the time the vessel is in port waiting for the voyage to commence or takes place afterward. The liability under a policy of insurance upon freight under the language "at and from" a certain port is from the time it is placed on the vessel in preparation for the voyage. Where an insurance upon a vessel lying in port for a voyage risk is described as being "at and from" a given port, the policy attaches at the commencement of the preparations for the voyage. When a vessel is insured for a voyage "at and from" a certain place, and the ship is not then in port, the policy begins to run from the time it safely arrives at the specified port, and continues during its stay while preparing for the voyage insured against. *Stevens v. Com. Mu. Ins. Co.*, 26 N. Y. 402; *Fernandez v. Gt. West. Ins. Co.*, 48 Id. 572; 8 Am. R. 571; *Snyder v. Atlantic Mu. Ins. Co.*, 95 N. Y. 196.

¹ *Collins v. Godfrey*, 1 Barn. & Ald. 450; *Dunstan v. Imperial Gas Light Co.*, 3 Barn. & Ad. 125; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104; *Blatchford v. Ross*, 54 Barb. 42; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Santa Clara Mining Assoc. v. Meredith*, 49 Md. 389; *Gardner v. Butler*, 30 N. J. Eq. 702.

² 29 Pa. St. 534.

vote created no debt, for the reason that it was in favor of a director for services rendered by him in his official capacity. The court said : "Although the director performed the work faithfully, his labors fell within the limit of his duty as a director, and the fact that he performed them with an exuberance of good faith, imposed upon the corporation no moral duty to pay for them. The legal obligation was as defective as the moral. When the resolution was passed, the consideration had been executed, for the services had been previously rendered, and there is no proof of a precedent or contemporaneous request. It is quite true that they were beneficial to the defendant, and a request might, in the liberal spirit of modern decisions, be implied ; but in the instance of gratuitous services performed by a party in the line of his legal duty there is no such inference. Our decision must be placed on yet higher ground. We regard it as contrary to all sound policy to allow the director of a corporation, elected to serve without compensation, to recover payment for services performed by him in that capacity, or as incidental to his office. It would be a sad spectacle to see the managers of any corporation, ecclesiastical or lay, civil or eleemosynary, assembling together and parcelling out among themselves the obligations or other property of the corporation in payment for their past services." A director may, however, perform extra labor and be justly entitled to compensation for it, and this may be established without an express promise from the peculiar nature of the services rendered. But when a director expects pay, his services should appear to have been bargained for, or their nature and extent be such as clearly to imply that both parties understood they were to be paid for, and not rendered gratuitously within the scope of a director's duty.¹

¹ N. Y. & New Haven R.R. Co. v. fayette, etc., R.R. Co. v. Cheeney, 87 Ketcham, 27 Conn. 170; First Nat. Ill. 446; Santa Clara Mining Assoc. v. Bank v. Drake, 29 Kansas, 311; La- Meredith, *supra*; Shackelford v. New

Directors of a railroad occupy a relation of trust toward the corporation and its stockholders, and are bound, in all matters pertaining to the construction of the road and the acquisition of the roadway, to act as the representatives and for the benefit of the company. They cannot lawfully acquire for themselves property which it is their duty to acquire for the company, and which is necessary for its purposes. Such a dealing would be just as objectionable as purchasing from the company land which it was their duty to sell in its behalf. In respect to this class of dealings, directors of corporations stand upon the same footing as ordinary trustees.¹ It was said by RAPALLO, J., in delivering the opinion of the New York Court of Appeals, that "It would be difficult to conceive a more gross violation of the rules governing the relation of trustee and *cestui que trust*, than to permit the directors of a corporation formed for the purpose of constructing a railroad, whose duty it was to acquire the right of way, to expend the funds of the corporation in expensive erections upon land necessary for the roadway, but which the company had not acquired the right to use, and at the same time to purchase or hire the same land in their individual right, and avail themselves of the title thus acquired to make extortionate demands upon the company for the use of the land, and, in default of submission to such demands, to destroy the erections they had themselves made as agents for, and at the expense of the company. Yet such is, in substance, the nature of the dealing in which the plaintiff in the present case has applied to the court to uphold and protect him."²

Orleans, etc., R.R. Co., 37 Miss. 202. A secretary is entitled to reasonable compensation. Rogers v. Hastings, etc., R.R. Co., 22 Minn. 25. The same is true of the clerk of a corporation. Missouri River R.R. Co. v. Richards, 8 Kansas, 101.

461; Hoyle v. Plattsburgh, etc., R.R. Co., 54 N. Y. 314; Covington, etc., R.R. Co. v. Bowler, 9 Bush. Ky. 468; Gilman, etc., R.R. Co. v. Kelly, 77 Ill. 426; Hoffman Coal Co. v. Cumberland Coal Co., 16 Md. 456; Cumberland Coal Co. v. Sherman, 30 Barb. 553.

¹ Aberdeen R.R. v. Blakie, 1 MacQ.

² Blake v. Buffalo Creek R.R. Co., 56

§ 268. Corporate liability on engagement of agent.—When a corporation permits its officers and agents to take such steps, and pursue such a course as to give a person hired by them to do work reason to believe that he is employed by the corporation, he is entitled to consider and hold the corporation liable for his services.¹ The general manager of a railroad company has, as incidental to his situation, authority to bind the company to pay for surgical attendance bestowed at his request on an employé of the company injured by an accident on its railroad.² Although a station agent of a railroad company is not authorized by virtue of his position as such agent to employ a hotel-keeper, at the expense of the company, to attend to an employé of the company injured while working for it, nor to furnish such employé with board and lodging while disabled;³ yet it is different as to the general agent of the company, who has such power; and a hotel-keeper would not be compelled, after the general agent of the company had agreed that the company would pay for the board and service, to institute an inquiry as to the liability of the company to take care of the disabled employé, before receiving him into his house.⁴

N. Y. 485. As to pay for services of president of corporations, see Beatty Organ, etc., Co., 41 N. J. Eq. 470.

¹ Gowen Marble Co. v. Farrant, 73 Ill. 608.

² Walker v. Gt. Western R.R. Co., L. R. 2, Ex. 228. See Cook v. Hannibal, etc., R.R. Co., 63 Mo. 397.

³ Tucker v. St. Louis, etc., R.R. Co., 54 Mo. 177; Cooper v. N. Y. Cent. & Hudson River R.R. Co., 6 Hun, 276; Stephenson v. N. Y. & Harlem R.R. Co., 2 Duer, 341; Cox v. Midland Counties R.R. Co., 3 Exch. 268.

⁴ Toledo, etc., R.R. Co. v. Prince, 50 Ill. 26; Same v. Rodrigues, 47 Id. 188; Marquette, etc., R.R. Co. v. Taft, 28 Mich. 289; Atlantic & Pacific R.R. Co. v. Reisner, 18 Kansas, 458. See

Shriver v. Stevens, 12 Pa. St. 258. While a railroad company is under no legal obligation to furnish an employé who may receive injuries in the service of the company with medical attendance, if a surgeon has been employed by an agent of the company, although the agent may not have had express authority, yet slight acts of acquiescence by the company will be sufficient to justify a jury in finding that the employment was the act of the company. Cairo & St. Louis R.R. Co. v. Mahoney, 82 Ill. 73. One J., while in the employment of a railroad company as a brakeman, was run over by a locomotive and injured. The station agent at the place where the injury was done employed B. to nurse and take care of J., telling him

Where a promissory note was signed by a township trustee, without indicating whether he was acting as trustee for the civil or for the school township, but the note recited that it was given for work on a school building, it was held that the payee might maintain an action on the note against the school township.¹

The rule as to the liability of a corporation for the engagements of its agents is applicable to agreements within the corporate powers in general. In an action against a bank to recover the value of ten shares of its capital stock which it was claimed the bank had wrongfully converted to its own use, it was proved that the president of the bank sent for the plaintiff and told him that there would be a new organization of the bank ; that the bank had concluded that if the plaintiff would act as director of the bank, and give it all the business of a firm of which the plaintiff was a member, as they had done before, and use their influence, they being one of the oldest firms in the city, and doing a heavy business with the bank, the bank would give the plaintiff ten shares of its capital stock ; that the plaintiff

that the railroad company would pay him for his services, which B. accordingly performed, and presented his bill to the station agent for payment. The latter wrote to the general superintendent, stating fully all that had been done, and after the account was rendered, the general superintendent conferred with the station agent with reference to the various items, and said that if they were reasonable he would pay the account. It was held that B. was entitled to recover a reasonable compensation. Toledo, etc., R.R. Co. v. Rodrigues, *supra*.

¹ *Sheffield School Township v. Andress*, 56 Ind. 157. See *Whitney v. Stowe*, 111 Mass. 368. In an action to recover money alleged to have been paid without legal authority by the

treasurer of a town, it appeared that the defendant was not a public officer, but one of a committee appointed by the town to execute the powers conferred upon the town by statute for supplying its inhabitants with water. It was held within the power of the town to compensate the members of this committee for their services, and that the intention and agreement of the town to make such compensation might be shown either by a previous vote, or by subsequent action adopting the doings of the committee. *Arlington v. Peirce*, 122 Mass. 270. See *Emerson v. Newbury*, 13 Pick. 377; *Crenshaw v. Roxbury*, 7 Gray, 374; *Simpson v. Malden*, 109 Mass. 313; *Parks v. Waltham*, Ib. 160.

accepted the proposition, acted as director, and the firm did all their business with the bank. It was held that as the agreement was fully carried out on the part of the firm, there was a sufficient consideration to sustain the contract for the stock, and that the bank sanctioned the action of its president by receiving the benefits of the contract.¹ A bank being much embarrassed, and holding \$5,000 of H.'s money which was liable to be drawn out at any time, but which the bank officers were anxious to retain, and J. owing the bank a large sum, which he was unable to pay, B., the cashier, proposed to H. that he should loan the \$5,000 to J. to apply on the latter's debt to the bank, to be secured by J.'s bond and mortgage on his property. There was a prior mortgage on J.'s property against which B., as cashier, delivered to H. a bond of indemnity. The two operations of obtaining ready money on the debt of J., and paying the debt of the bank to H. in long paper, were combined in one, by taking security from J. to H., instead of having it made to the bank, and then assigned to H. J. and H. did not deal with each other at all in the transaction, but both with the bank; and the mortgage which J. gave was in reality given to secure his debt to the bank, and was only made to H., because, under the arrangement made by B., the bank was to pay a debt of equal amount. H. paid the money to the bank, and the bank gave J. credit to that amount on its books; and the bank defended H. in a suit to foreclose the prior mortgage. In an action by H. on the contract of indemnity against the bank, it was urged in behalf of the bank that the arrangement was entered into without authority, inasmuch as there was nothing done by the directors authorizing it, and that the by-laws of the bank required all contracts to be signed by the president. On the other hand H. proved that for a considerable period before

¹ Rich v. State Nat. Bank, 7 Nebraska, 201. See Union Bank of Fla. v. Call, 5 Fla. 409.

and after the giving of the bond of indemnity, the entire management of the bank was virtually in the hands of the cashier, the directors seldom meeting unless to declare dividends, and very little attention being paid to the rules prescribed by the by-laws for the transaction of business. It was decided that the contract must be held to have been affirmed by the subsequent acquiescence of the corporation, and to be binding upon it.¹

An action was brought by the indorsee of a negotiable draft against a corporation as acceptor. The defendant was incorporated by an act of the legislature of Missouri with the general purposes and powers of a life insurance company, and authorized to establish departments and branches of the association in each State, territory, or foreign country in which it should transact business. The corporation had, previous to July, 1872, agreed to make a loan to one C. on property in M., and a mortgage had been executed and delivered to the company, but, by agreement of the parties, the money was not to be advanced until the following October. C., desiring to use the funds before the time they were to be advanced by the company, drew the draft payable October 15, 1872, for the amount agreed upon, payable to the order of H. & Co. The draft was accepted by R., the manager of the department located at M., with the knowledge and consent of the treasurer of the department. It was held that as the transaction was shown to have been in the business of the company, and on its behalf, and R. intended and assumed so to contract, the company was liable, and not R. individually.² An action was brought by

¹ *Peninsular Bank v. Hanmer*, 14 Mich. 208.

² *Hascall v. Life Assoc. of Am.*, 5 Hun, 151. In an action on a note purporting to have been given by an incorporated manufacturing company which was signed "C. agent, by D." D. testified that C. was the agent of

the company, and that the witness was clerk; that the note was given for borrowed money; that he was in the habit of executing notes in this manner for the company with its knowledge, and that he did it by direction of the agent, and that the note in suit was used by the company in its business. It was

the indorsee of a promissory note against a corporation as indorser, the note being payable to the corporation or order nine months from date with interest. The day before the note became due D., the agent of the corporation, in consideration of an extension of the time of payment, made the following indorsement on the note: "Accountable without notice or demand." The by-laws of the corporation made it the duty of the agent "to purchase stock and make sales for the corporation, to hire and discharge help, and manage the concerns of the corporation, being subject at all times to the direction of the board of directors." It was insisted by the defense that D. acted as the agent of the maker of the note, and not of the corporation, when he made an agreement for an extension of the time of payment and waived demand and notice. It was held that the corporation being, by its agent, a party to the agreement for an extension of time was not discharged, and that the fact that the agent agreed to pay nine per cent. interest to obtain the delay, did not absolve the corporation from paying what was legally due.¹

held that the evidence of the execution of the note by the company was sufficient to go to the jury, and for them to find that the company had adopted by usage the signature of its agent as its own. *Mead v. Keeler*, 24 Barb. 20. In an action against an agricultural society on a promissory note given by W. & P., president and secretary of the society in its behalf in part consideration for the purchase of a fair-ground, it was claimed that, although W. and P. had no authority to make the contract, yet that the society had adopted it. The evidence showed that after the purchase the society did considerable work upon the ground; but it did not appear what proportion of the members of the society assisted in this work, nor that they had actual knowledge of the manner in

which the contract was made. It was held that the acts of the members did not estop the society from insisting upon the invalidity of the contract. *Tracy v. Guthrie County Agr. Soc.*, 47 Iowa, 27.

¹ *Whitney v. South Paris Manf. Co.*, 39 Me. 316. When a person has the actual charge and management of the general business of a corporation with the knowledge of the members and directors, this is evidence of his authority without showing any vote or other corporate act constituting him the agent of the corporation. *Goodwin v. Union Screw Co.*, 34 N. H. 378. *Grape Sugar, etc., Manf. Co. v. Small*, 40 Md. 395. The station agent of a railroad company testified that he had charge of receiving and forwarding

In an action against a bank on a contract, the defense was that the contract was not signed by the president and cashier as required by the general banking law of the State, which provided that "contracts made by the bank or banking association established under the provisions of this act, and all notes and bills issued and put in circulation as money, shall be signed by the president and cashier thereof." It was held that any person might contract with a bank through other than its statutory agents if he deemed it safe and advisable, but that, in such case, before he could enforce the contract, he would be compelled to show as best he could the authority under which the agent acted.¹ The same objection was raised in New York to a certificate of deposit issued by a bank and signed by the cashier alone. It was held that the law was to be construed as appointing statutory agents to contract in behalf of the bank where no designation of such agents was made by the associates, but not as prohibiting the association from conferring that power upon its officers or appointing other agents to contract in its behalf.²

freight at that station; that his duties with regard to freight were to receive, weigh, and get it off as soon as possible; that he had no authority to make contracts, no authority over the locomotive power of the road; and that he had never agreed to send freight at any particular time. It was held that the jury might legally find that the company held him out as its agent authorized to contract for sending freight the next day. *Deming v. Grand Trunk R.R. Co.*, 48 N. H. 455. Where the president of a railroad company advertises the tariff of fare and freight, the acts of the corporation in receiving and appropriating the tolls thus established, presupposes a delegated authority in him for the purpose. *Hilliard v. Goold*, 34 N. H. 230; *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

¹ *Dana v. Bank of St. Paul*, 4 Minn. 385.

² If an action of ejectment is brought by a corporation to recover possession of premises, a verbal notice to quit, given by an agent, is sufficient without other evidence of authority, the bringing of the ejectment showing that the corporation authorized and adopted the agent's act. *Roe v. Pierce*, 2 Campbell, 96. In an action against a railroad company to recover a tax, it appeared that the legal title to a portion of the land assessed was never in the corporation, but was held by J., who was a principal stockholder of the company. It was averred by the defendant in its answer that its superintendent furnished to the assessor a written statement of the real estate and improvements belonging to the company, and affixed

It is not competent for a railroad conductor to bind the company by an agreement with a passenger to carry him to a given place and allow him to leave the train there, unless the place is a regular station of that particular train. The

to different items of the list certain valuations which were then accepted by the assessor as the true valuations, but were afterward altered and increased by him without the knowledge of the superintendent. It was proved that the list so furnished by the superintendent included, with other property, the lots claimed to have been owned by J. It was held that the company could not be heard, against the admissions of the pleadings, to dispute the authority of its agent, and that the list given by him to the assessor was binding upon the company, and justified the assessor in adopting it as a correct statement of its property. *People v. Stockton, etc., R.R. Co.*, 49 Cal. 414.

In an early case in New York, it was contended that if a loan was illegal, it must be deemed the act of the agent or officers of the corporation, and not of the corporation itself, and that the corporation ought, therefore, to be allowed to recover back its property thus improperly disposed of. SUTHERLAND, J., in delivering the opinion of the court, said: "This would be a most convenient distinction for corporations to establish, that every violation of the charter, or assumption of unauthorized power on the part of the officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend.

31. The cashier of a bank has implied authority from his official designation as cashier to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by him will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction and deal with him on the basis of its existence. *Coats v. Donnell*, 94 N. Y. 168. The acts of an agent may be explained by his declarations made at the time, but not afterward. A religious congregation would not be affected by the declaration of one of its members as to what had previously passed at a meeting of the congregation, it being hearsay. The facts should be proved by the testimony of some person who was present, unless they were reduced to writing, in which case the writing should be produced. *Magill v. Kauffman*, 4 Serg. & Rawle, 316.

When one assumes, without authority, to act for another, if that other wishes to avail himself of the acts of the agent, he must adopt the whole or none. But if the agent is duly appointed and vested with special or limited powers, whatever he does in such case beyond his authority is void unless ratified, without affecting the validity of what was done within the scope of his powers. *Davenport Savings Fund Assoc. v. North Am. Fire Ins. Co.*, 16 Iowa, 74. In an action against a bank on certain promissory notes payable to bearer, alleged to have been made by the president of the bank, and which, after being signed by the cashier, were stolen and the signature of the president forged, it was urged in

duty of a conductor is to run the trains according to the public arrangements, and he has no power to change them. A passenger has no right to infer that the conductor has any such power from his general duties as conductor, and no reason to suppose that he can bind the railroad company by such an agreement.¹

behalf of plaintiff that as the notes were made upon paper belonging to the bank, were in all respects perfect except in the signature of the president, and they had got into circulation by means of the carelessness of the officers of the bank, they ought to be regarded as the notes of the corporation, even if the name of the president was feloniously put to the notes by some person into whose hands they fell. It was held, however, that the bank was in no way liable on the notes to a *bona fide* holder. *Salem Bank v. Gloucester Bank*, 17 Mass. 1. A water-power company by a resolution appointed a general agent and gave him authority to do any and all acts he might deem for the interest of the company, and directed the president and directors to give him a power of attorney for that purpose. The power of attorney authorized the agent to manage and transact all business connected with the property of the company, "and generally to do all other acts and things for and in behalf of said company that he may deem proper to further and protect its interests." It was held that the agent had no power to make or indorse notes in the name of the company so as to make a member liable therefor as a stockholder; and that proof that the agent was in the habit of giving notes for the company was inadmissible, unless accompanied with an offer to prove that the company had some knowledge that the agent was in the habit of giving notes in the name of the company. The fact that the agent was a director

would give him no authority in the premises, excepting when acting as a member of the board, unless there was some by-law conferring power on him. *Lawrence v. Gebhard*, 41 Barb. 575. Where it was claimed that a corporation had ratified a sale of its real estate at a meeting, it was shown that three-fourths of the stock voted thereat were represented by directors who either advised or participated in the sale; that the motion to confirm the sale was not put in writing nor entered on the minutes; that the meeting, upon discovering objections to the contract after its adoption, solicited a release from, or modification of it; and that, no previous notice having been given to the stockholders that the sale would be before them for rejection or confirmation, its approval was accidental, and not a deliberate act. It was held that the corporation was entitled to have the contract rescinded, and the property reconveyed upon equitable terms. *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117. See *Blood v. Marcuse*, 38 Cal. 590; *Gashwiler v. Willis*, 33 Id. 16; *Carpenter v. Biggs*, 46 Id. 91.

¹ *Ohio & Miss. R.R. Co. v. Hatton*, 60 Ind. 12. If a valid special contract is made entitling a person to conveyance on a railroad train, the rights and responsibilities of the parties must be governed by it. Ordinarily, a ticket is not a contract, but it may be and often is a contract, as where it is sold at less than the general rate, and is accepted and is to be used and enjoyed on specified conditions. The reduced rate

§ 269. Ratification by corporation of acts of its agent.—To render a ratification effective and conclusive, the principal must at the time have been fully aware of every material circumstance of the transaction, and the act of ratification must have been an independent and substantive act founded on perfect freedom of volition.¹ Where the question was as to the ratification by a corporation of a contract made in its behalf by its president for the purchase of real estate, it was shown that the board of trustees of the company acted upon information communicated by the president in a written report upon the subject of the purchase, which report did not profess to give the details of the contract, but stated generally the fact of the purchase and the price to be paid, together with the advantages likely to result from the transaction ; and that the board by a unanimous vote ratified the report and proceedings. It was objected that the board acted in the matter without a knowledge of the facts, and that a ratification under such circumstances was not valid and could not be enforced. It was held that it could not be supposed that the report was received and voted on in silence, but the natural presumption was that it was fully considered, and the particulars inquired into and explained.²

The contract ratified must be one which could have been legally entered into by the corporation.³ It is essential that the party ratifying should be able not merely to do the

constitutes sufficient consideration for the restrictions usually contained in such tickets, and if a passenger accepts the ticket, he cannot take advantage of the reduction in the rate, and reject the conditions on which the reduction was made. Wilson v. New Orleans, etc., R.R. Co., 63 Miss. 352; Howard v. Chicago, etc., R.R. Co., 61 Id. 194.

¹ Cumberland Coal & Iron Co. v. Sherman, 20 Md. 117; Blen v. Bear River, etc., Co., 20 Cal. 602; Scott v.

Middletown, etc., R.R. Co., 86 N. Y. 200; Gilman, etc., R.R. Co. v. Kelly, 77 Ill. 426; Tracy v. Guthrie County Agr. Soc., 47 Iowa, 27.

² Ibid.; Shaver v. Bear River, etc., Co., 10 Cal. 396. See Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Darst v. Gale, 83 Ill. 136.

³ Taymouth v. Koehler, 35 Mich. 22; M'Loughlin v. Detroit, etc., R.R. Co., 8 Id. 100.

act ratified at the time the act is done, but also at the time the ratification is made. The same want of power to give an agent authority to contract, and thereby bind the corporation beyond the scope of the corporate objects, will be equally conclusive against any attempt to ratify a contract which the corporation had no right to enter into.¹ The intervening rights of third persons cannot be defeated by the ratification. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. For the same reason liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property.²

A principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent.³ In an action against a manu-

¹ Gage v. Newmarket, 18 Q. B. 457; Cracken v. San Francisco, 16 Cal. 591; Beach v. Fulton Bank, 3 Wend. 573; Crum's Appeal, 66 Pa. St. 474.

Bank of Genesee v. Patchin Bank, 3 Kern. 315; McCullough v. Moss, 5 Denio, 567; Albert v. Savings Bank, 1 Md. Ch. 407; Abbot v. Balt., etc., Co., Ib. 542; Strauss v. Eagle Ins. Co., 5 Ohio St. 59; Bacon v. Miss. Ins. Co., 31 Miss. 116; Downing v. Mt. Washington R. Co., 40 N. H. 230; Peterson v. Mayor of N. Y., 17 N. Y. 449; Mc-

² Cook v. Tullis, 18 Wall. 332. An act done previous to incorporation may be adopted afterward so as to be equally binding and conclusive. Preston v. Liverpool, etc., Co., 7 Eng. L. & Eq. 124; Goody v. Colchester, etc., Co., 15 Id. 596; Dubuque Female College v. Dubuque, 13 Iowa, 555.

³ Gordon v. Preston, 1 Watts, 387;

factoring corporation for a breach of contract, it appeared that the corporation, being in need of a foreman, the president signed a written contract made with the plaintiff in behalf of the corporation to employ him for a period of two years on an agreed salary, payable in weekly instalments, and to give him fifty shares of the capital stock ; that a few days afterward the plaintiff saw the president, who reiterated the contract verbally ; and that the secretary of the company drew up and signed a memorandum on the back of the original contract reciting that the corporation agreed to pay the plaintiff a stipulated sum per week, in consideration of his signing the contract, from the 19th of August to the 1st of September, the day on which he was to enter upon his duties as foreman. It further appeared that the plaintiff abandoned a situation, and at the time agreed took charge of the defendant's factory ; that two of the directors of the corporation who attended to its daily concerns paid the plaintiff his weekly allowance for his services for a period of five months, and until he was discharged without sufficient cause, and without any reason whatever being given him therefor ; and that after his discharge he sought employment of the same character and in the same capacity as that from which he was discharged, and in which for many years he had successfully labored, but during the life of the contract he was not able to find any, though he might have obtained employment of a lower grade as journeyman or common laborer in another State. It was also proved that a month after the plaintiff commenced working in the factory, the defendant, in pursuance of a previous intention, sold and transferred to another corporation all of its property, delivered possession, and thereafter ceased to have any right or interest in, or control

Breden v. Dubarry, 14 Serg. & Rawle, Allen, 326 ; Planters' Bank v. Sharp, 4 30 ; Kelsey v. Nat. Bank, 69 Pa. St. Smed. & Marsh, 75. 426 ; Brown v. Winnisimmet Co., 11

over, the property, or of the business carried on in the factory; and that no notice was given to the plaintiff of the sale and transfer, but he was ignorant of the same until the bringing of the suit. It was held that there had been a ratification of the contract by the defendant, and that the plaintiff was entitled to recover what he could have earned at the contract price during the balance of the term, taking into consideration the sum payable weekly, and also the value of the stock stipulated for, less the value of the plaintiff's time to himself, estimating the facilities or difficulties of his finding employment, and the amount he might have earned by the use of reasonable diligence.¹ Where railroad ties belonging to a railroad company were sold by its president to a bank in part payment of the indebtedness of the company to the bank, which sale was unauthorized, and the fact that such a sale had been made was communicated to the board of directors and talked of at one of their meetings, and they did nothing to disaffirm it, it was held that the sale must be deemed to have been ratified by them.² In an action against a railroad company for the loss of freight, B., a sub-agent, testified that he, as agent of the company, received the plaintiff's freight and gave a receipt for it; that both the superintendent and president of the company knew of his, B.'s, acts in the character of agent, and made no objection; that there were two instances in which the railroad officials delivered freight on the production of witness' receipt; and that the board of directors had frequently given directions in their business to witness. It was held that the evidence was admissible as tending to prove ratification of the agency on the part of the company.³ Although a principal must disavow the unauthorized

¹ Perry v. Simpson Waterproof Manf. Co., 37 Conn. 520, PARK, J., dissenting. Loan & Trust Co., 16 Wis. 629; s. c. 14 Id. 325.

² Walworth County Bank v. Farmers' Kidd, 29 Ala. 221.

³ Ala. & Tenn. Rivers R.R. Co. v.

act of his agent within a reasonable time, yet the consequence of his not doing so is not always the same. The conduct of the principal may be interpreted as evidence of his assent to what has been done in his name; or he may be estopped to deny the authority of the agent. In either case, his conduct is proof of an intention to ratify, but it differs in degree and in the legal principle by which it is tested. In an action by a bank against a mining company for money borrowed by the superintendent of the company, it was held that the company should have repudiated the debt created by the agent in order to avoid the inference which might be drawn from its silence, and that notice to the bank of the disavowal was a necessary part of the act.¹ When the directors of a bank are informed that the cashier has offered a reward for the detection of a thief, it is their duty to promptly disavow the act if they do not intend that the bank shall be bound by it. If they have notice of the offer and do not dissent from it, their assent will be presumed. It is not necessary in order to bind the bank by their acquiescence that notice should have been given to the directors when sitting in their official capacity as a board. If they are personally cognizant of the offer made by the cashier, it is their duty to call a meeting of the board and disavow the act, if they are unwilling that the bank shall be bound by it. Where the evidence tended to show that the cashier offered a reward at the instance of one of the directors, and upon the suggestion that "the directors would bear him out in it"; that the offer was made in the presence of three of the directors; and that the plaintiff met all of the directors separately, except one, and talked the matter over with them, it was held sufficient to go to the jury on the question of ratification.²

¹ Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 565; s. c. Ibid. 241; 1 Id. 533. A promissory note belonging to an insurance corporation having been wrongfully taken by A., one of the officers of the company, and converted

² Kelsey v. Nat. Bank, 69 Pa. St. 426.

Notwithstanding the law requires a certificate of incorporation to be recorded to constitute a body politic, yet if a contract is made through the acting president after the certificate has been signed by the members of the proposed corporation, but before it is recorded, and the company after its incorporation accepts work done under the contract, it will be estopped, both in law and equity, from denying its liability on account of the same.¹

§ 270. Where the contract is entered into before organization.—When a number of persons are not incorporated, but informally associated in the pursuit of a common object with the intent to procure a charter in furtherance of their design, they may authorize certain acts to be done by one or more of their number with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits of the same enjoyed by it, the company must take such benefits *cum onere*, and make compensation therefor. But the projectors or promoters of the enterprise must be a majority of such persons. A minority would have no more authority to bind the association or corporation in its incipient or inchoate condition than they

to his own use, the president and vice-president of the corporation afterward took A.'s note "in full satisfaction and discharge of all and every claim" of the corporation against him. The corporation having used the note in payment of a corporate debt, it was held that it constituted a ratification by the corporation of the settlement made with A., although the president and vice-president in making it acted without authority. *Houghton v. Dodge*, 5 *Bosworth*, 326. The subsequent ratification by the board of trustees of a municipal corporation within their powers,

and according to the method of contracting pointed out in the charter, binds the corporation. *McCracken v. San Francisco*, 16 *Cal.* 502; *Bottman v. San Francisco*, 20 *Id.* 96; *People v. Swift*, 31 *Id.* 26. When the adoption of any particular form or mode is necessary in the first instance to confer authority, there can be no valid ratification except in the same manner. *Despatch Line of Packets v. Bellamy Manf. Co.*, 12 *N. H.* 205.

¹ *Grape Sugar, etc., Manf. Co. v. Small*, 40 *Md.* 395.

would have to bind it when fully organized.¹ Questions of a similar character have arisen in England where the projectors or promoters of railroad enterprises, who were about to solicit acts of incorporation, had agreed with the

¹ Bell's Gap R.R. Co. v. Christy, 79 Pa. St. 54; Wood v. Wheeler, 93 Ill. 153; Reichwald v. Commercial Hotel Co., 106 Id. 439. In a suit against a corporation to recover compensation for services claimed to have been rendered by the plaintiff, the facts were substantially these: One J., being a patentee, and desiring to form a corporation to manufacture his patent, purchased a piece of ground with buildings, and endeavored to have a company organized to which he could sell the property. The plaintiff subscribed for stock upon condition that he was to be employed by the company and pay for the stock in labor. After part of the stock was subscribed, the stockholders, at a meeting held by them, authorized J. to act as superintendent of work done about the buildings, and the plaintiff was employed by him and did the work for which the action was brought. The requisite amount of stock not being obtained, and the organization not, therefore, completed, plaintiff quit work. Most of those who had subscribed for stock concluding to form a new company with the same name and object, other subscribers were obtained and the defendant corporation organized. It was held that, as the plaintiff was employed and did the work for which the suit was brought before the stock under the first attempted formation of a corporation was fully subscribed, and before any election of directors, any contract for services entered into before that time by such stockholders as had then subscribed, would not have been binding upon the corporation if it had afterward been fully organized, much less upon the

present corporation after the old attempted organization had been abandoned. Western Screw & Manf. Co. v. Cously, 72 Ill. 531. See Rockford, etc., R.R. Co. v. Sage, 65 Ill. 328; N. Y. & New Haven R.R. Co. v. Ketchum, 27 Conn. 170. The rule which makes an assignment of *chooses in action* subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. B. and D. entered into a written contract with the promoter of a company to sell their business to the company when formed, part of the purchase money to be paid in debentures of the company payable to bearer. The articles of association adopted this agreement and directed it to be carried into effect. The directors accordingly gave to B. and D. debentures under the seal of the company, by each of which the company covenanted to pay the sum therein mentioned to B. and D., their executors, administrators, and assigns, or to the bearer. Some of these debentures were passed by delivery to A., who was a *bona fide* holder for value. It was held that, in the winding up of the company, A. could claim payment of these debentures in his own name, without being subject to any equities existing between the company and B. and D. Sir J. ROLT, L.J., said: "The right to this money was assignable in equity, and though, in the absence of anything more than a mere assignment, the assignee would take subject to the equities existing between the original parties to the contract, I am of opinion that there is nothing inequitable in allowing the

proprietors of land over which such railroads were to pass, and who were prepared to oppose such acts of incorporation, to pay certain sums of money for the land to be taken and for residential damages, in consideration that they withdrew their opposition. In such cases it has been held that a corporation is in equity bound by the contract of its projectors, when it afterward takes the benefit of the contract.¹

In this country, agreements made with corporations after they are chartered, but before their organization, to take and pay for shares in the capital stock, have often been enforced. This is simply the converse of the doctrine which binds the corporation by a contract made by the projectors of which the corporation afterward takes the benefit.²

§ 271. Assuming debt of third person.—The directors of a corporation have not power to assume in its behalf the debt of a third person, unless under circumstances of urgent necessity, in order to save the credit of the company and enable it to continue its business. If some of the directors are individually liable for the debt, and their assent is relied on to make a majority, the transaction is not binding on the corporation unless it was entered into in good faith on the part of the directors. Whether there was such an urgent necessity as to authorize the directors to make or sanction the arrangement, and whether they acted in good faith, are questions for the jury.³ Where officers of a cor-

debtor in an obligation to contract with his creditor that he will not avail himself of any such equities, that he will pay the amount due on the obligation to the assignee of the creditor (whether he be such assignee by instrument in writing, or by mere delivery of the obligation), without regard to any such equities." *In re Blakely Ordnance Co.*, L. R. 3, Ch. 154, adopting *In re Agra* and *Masterman's Bank*, L. R. 2, Ch. 391.

¹ *Preston v. Liverpool, etc., R.R. Co.*, 7 Eng. L. & Eq. 124; *Gooday v. Colchester, etc., R.R. Co.*, 15 Id. 596; *Edwards v. Grand Junction R.R., 1 M. & C. 650*; *Stanley v. Chester, etc., R.R. Co.*, 9 Sim. 264, aff'd 3 M. & C. 793.

² *Low v. Conn., etc., R.R. Co.*, 45 N. H. 370; s. c. 46 Id. 284.

³ *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144.

poration, having general authority to execute promissory notes for the corporation in proper cases, but without authority in the particular instance, in a transaction not connected with the corporate business, not authorized by the corporation, and without any consideration going to the corporation, execute in the corporate name to a third person, who has no knowledge of their want of authority, a promissory note for a claim which such third person holds against another corporation, the first-mentioned corporation is not liable on the note to the payee if the corporation has not ratified the acts of its officers.¹

Although a negotiable security of a corporation, which upon its face appears to have been duly issued by the corporation, is valid in the hands of a *bona fide* holder without notice, notwithstanding it was in fact issued for a purpose and at a place not authorized by the charter, yet the officers of a banking association or other corporation have no power to bind the institution as an accommodation indorser or surety of another, unless it appears that the note has been discounted in good faith by the party suing on it in consequence of a representation made by the bank that it was its own note.² In an action by a bank against a joint stock company on a negotiable promissory note indorsed by B., the agent of the company, in the name of the defendant as its agent for the accommodation of a third person, it was proved that B. had frequently before indorsed the business paper of the company in the same manner and procured it to be discounted by the plaintiff, which indorsements had been recognized by the company; that the note was discounted for the defendant upon its ap-

¹ Ehrgott v. Bridge Manf. Co., 16 Bank v. Empire Stone Dressing Co., Kansas, 486. See Rahm v. King 19 How. Pr. 51; S. C. 30 Barb. 421. Wrought Iron, etc., Manf. Co., *Ibid.* 277. See Farmers', etc., Bank v. Butchers',

² Bank of Genesee v. Patchin Bank, etc., Bank, 16 N. Y. 125; Monument 3 Kern. 309; Morford v. Farmers' Nat. Bank v. Globe Works, 101 Mass. Bank, 26 Barb. 568; Bridgeport City 57.

plication through its secretary, and the avails paid over to him, which the defendant used in its business in buying grain on commission for the maker, and that the plaintiff had no notice that the note was accommodation paper. It was held that whether B., the agent, had authority from the defendant to indorse accommodation paper in its name, or whether the note in suit was in fact indorsed for the accommodation of the maker or not, was immaterial, as the plaintiff had the right to presume from the facts found that it was business paper such as the bank had been in the habit of discounting for the defendant, and that the defendant was precluded from denying that it was such business paper.¹

§ 272. Corporate bonds.—Bonds of a corporation payable to bearer are to be regarded as commercial paper in the absence of any special statute on the subject of their negotiability, and if transferred, the corporation is not entitled to a set-off against the original payee without proving that the existing plaintiff is not a *bona fide* holder.² A railroad bond was made payable to bearer, or to any designated person, or to the order of any one, and no payee was named in it. This bond, together with many others similar to it, amounting in value to about eleven hundred thousand dollars, were sold at or near the time they bore date by the railroad company at public auction to numerous purchasers. The company realized the money for which the bonds were

¹ Bank of Auburn v. Putnam, 3 667; Morris Canal Co. v. Lewis, 1 Keyes, 343; S. C. 1 Abb. Ct. of App. Beasley N. J. 323; Clark v. Janesville, 10 Wis. 136; Miller v. Rutland, etc., Decis. 80.

² Bartholomew v. Bright, 18 Ind. 93; New Alb. & Plank R. Co. v. Smith, 23 Id. 353; Nugent v. Supervisors, 19 Wall. 241; Clark v. Iowa City, 20 Id. 583; Mu. Life Ins. Co. v. Cleveland, etc., R.R. Co., 41 Barb. 9; Brainerd v. N. Y. & Harlem R.R. Co., 25 N. Y. 496; S. C. 10 Bosw. 332; Morris Canal, etc., Co. v. Fisher, 1 Stockton N. J. 667; Morris Canal Co. v. Lewis, 1 Keyes, 343; S. C. 1 Abb. Ct. of App. Beasley N. J. 323; Clark v. Janesville, 10 Wis. 136; Miller v. Rutland, etc., R.R. Co., 40 Vt. 339; De Voss v. Richmond, 18 Gratt. 338; Craig v. Vicksburg, 31 Miss. 217; Haven v. Grand Junc. R.R. Co., 109 Mass. 88; Porter v. McCollum, 15 Ga. 528; Phila., etc., R.R. Co. v. Smith, 105 Pa. St. 195; Winfield v. Hudson, 28 N. J. 255; Savannah, etc., R.R. Co. v. Lancaster, 62 Ala. 555.

sold, and used it partly in payment of pre-existing obligations, and partly in expenditures to carry on and complete the road. All of the bonds purported on their face to be secured by a mortgage of the same date of all of the railroad property to trustees, and such a mortgage was in fact duly executed and subsequently ratified and confirmed by a statute. It was held that a purchaser of the bond for value had a right under the implied authority conferred upon him to insert his own name in the bond as payee or obligee.¹ In a suit brought in the Circuit Court of the United States for the district of Massachusetts on certain railroad bonds, it appeared that the bonds in question were issued by a railroad company in Massachusetts in regular course and for a sufficient consideration, and that payment had been demanded and refused; that bonds of this description were sold in the market and passed from hand to hand by delivery at prices varying according to the state of the market; that those in question were issued at or about

¹ Chapin v. Vt. & Mass. R.R. Co., 8 Gray, 575. As a rule bonds and other contracts under seal are not negotiable instruments, the legal title to which may be transferred from one person to another by mere delivery, so that an action can be maintained by the holder in his own name. In Massachusetts it is provided by statute that "all bonds and other obligations under seal for the payment of money purporting to be payable to the bearer, or to some person designated as bearer, or payable to order, issued by any corporation or joint stock company," shall be negotiable like promissory notes. Sts. of Mass., ch. 76. Five bonds payable to bearer for one thousand dollars each were stolen from the owner in May, and in November following received by a savings bank in the usual course of business for a valuable consideration, without notice of any defect in the

title, and without reasonable cause to question their genuineness. In the interval of time between the foregoing dates the bonds had been fraudulently altered, by whom it did not appear. The statute did not require the bonds to be numbered, and the alteration of the numbers did not affect the rights, interests, duties, or obligations of either party to the contract. It was held that the savings bank had a good title to the bonds. Com. v. Emigrant Industrial Savings Bank, 98 Mass. 12. In New York an obligation payable to A. B., or to his certain attorney, executors, administrators, or assigns, though called a bond, has been held not to be a specialty, but in the nature of commercial paper, negotiable by delivery under an assignment in blank. Brainerd v. N. Y., etc., R.R. Co., 35 N. Y. 496; Blake v. Supervisors, 61 Barb. 149.

their date payable in blank to a citizen of Massachusetts; that they came into the hands of the holder in regular course; that he then and since lived in New Hampshire, and, before the commencement of the suit, filled up the blank by inserting his name "or order." The circuit court held that as the bonds could not be regarded as negotiable instruments, or if negotiable, not payable to bearer, the suit could not be maintained for want of jurisdiction. The Supreme Court of the United States, per NELSON, J., in reversing the decision, said: "As to the negotiability of this class of securities when shown to be intended that they should possess this character by the form in which issued and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question."¹ An act of the legislature authorized a vil-

¹ White v. Vermont, etc., R.R. Co., 21 How. 575. "It is true," continued the judge delivering the opinion in this case, "that in England the law is that a bond delivered in blank, as it respects the payee is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and also, that to admit the parol authority to fill up the blank, would in effect make a bond transferable and negotiable like a bill of exchange or exchequer bill." Hibblewhite v. M'Morine, 6 Mees. & Welsb. 200, and Enthoven v. Hoyle, 9 Eng. L. & Eq. 434. The law had been otherwise held by Lord MANSFIELD in the case of Texira v. Evans, cited in Masten v. Miller, 1 Anstruther, 228; but was distinctly overruled by PARKE,

B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case. Courts of the highest authority in this country have followed Lord MANSFIELD, and have not hesitated to meet the fears expressed by PARKE, B., that the effect would be to make the bonds negotiable, by admitting the consequence. Chief Justice MARSHALL, in the case of the United States v. Nelson, 2 Brock. 64, hesitated to reach this conclusion, but expressed a strong belief that, at some future day, it would be reached by this court. In Mercer County v. Hacket, 1 Wall. 83, GRIER, J., in delivering the opinion of the court, said: "When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be

lage to issue bonds under its corporate seal payable to bearer, and to exchange the same for an equal amount of the stock of a railroad company, provided commissioners appointed by the act should not negotiate the bonds until \$500,000 had been subscribed to the capital stock of the company, nor until the commissioners had made and filed their certificate that such subscription had been actually made by persons of ability to pay. It was held that the

allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court, but in nearly every State of the Union, is well known and admitted." "When the king of Prussia gave a bond which recited that he and his successors were bound for the payment of the principal and interest to every one who should for the time being be a holder of the bond, it was held that the property in it passed by delivery the same as in the case of a bank note, exchequer bill, or bill of exchange payable to bearer, and that therefore an agent in whose hands such a bond was placed for a special purpose, might confer a good title by pledging it to a person who had no knowledge that the person pledging it was not the real owner." *Gorgier v. Mieville*, 3 Barn. & Cress. (10 Eng. C. L.) 45. In *Brainerd v. N. Y. & Harlem R.R. Co.*, *supra*, DENIO, C. J., said: "The point of objection, when it is sought to bring such securities within the law of commercial paper, is, that being under seal, they are deeds, and commercial instruments are simple contracts. But when such obligations are issued to secure the payment of money on time, and contain on their face an expression showing

that they are expected to pass from one person to another and thus to perform the office of bills and notes or of money, as the words 'bearer,' or 'assigns,' or 'the holder,' or the like, the courts of this country, with a single exception, and those of this State without any exception, have concurred in attaching to them the attributes of commercial paper." The exceptional case referred to in the foregoing, is *Diamond v. Lawrence County*, 37 Pa. St. 351, in which the court said: "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us. Be it so. We are not insensible to the importance of this fact, nor are we wanting in deference to the learning and wisdom of the judges who differ from us. . . . We know the history of these municipal and county bonds; how the legislature, yielding to the popular excitement about railroads, authorized their issue; how grand jurors and county commissioners, and city officers, were molded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public, and what burdens of debt and taxation have resulted to the people. A moneyed security was thrown upon the market by the paroxysm of the public mind, and the question is now, how shall the judicial mind regard it?"

bonds were negotiable instruments in such a sense as would exempt them in the hands of a *bona fide* holder from a defense which might be available against the railroad company; an abuse or excess of power by the commissioners not affecting parties purchasing in good faith, beyond the means which the statute itself provided for ascertaining the facts on which the exercise of the power depended, which were declared by the act to be the certificate.¹ The legislature of a State by a resolution empowered a city to issue bonds to an amount not exceeding \$1,000, to aid in the construction and completion of a railroad which was chartered at the same session, provided the power so given should be approved by a two-thirds vote of the citizens. At three successive meetings of the citizens held at intervals, the proposition was voted down; but at a fourth meeting the requisite two-thirds vote having been obtained, the bonds were issued in the name and under the seal of the city, and delivered to the railroad company. These bonds soon passed into the hands of *bona fide* holders at something more than their par value, some being taken by individuals, and some by the banks of the State. The city continued to pay the coupons attached to the bonds for several years, and these payments regularly appeared in the city treasurer's annual reports. It was held that *bona fide* holders of the bonds were not affected by the action of the meetings held previous to the one which adopted the resolution that the bonds, which were payable to bearer, were negotiable, and that the city was estopped from denying their validity against *bona fide* holders.²

Bank of Rome v. Village of Rome,
19 N. Y. 20.

² Soc. for Savings v. New London,
29 Conn. 174. Where a bond executed
by a city under the corporate seal
promised to the bearer the sum of one
thousand dollars with interest at the
rate of six per cent. per annum, it was

held that as from its nature and form it
would be presumed to be the repre-
sentative of money, and to have been
put into the market for that purpose, a
bona fide holder for value acquired the
legal title and had a right to sue on it.
Craig v. City of Vicksburg, 31 Miss.
216. The statute authorizing the issue

County bonds, with coupons attached, possess all the qualities of commercial paper. They pass by delivery; the holder of them has a full title; and the county cannot set up against a person who has taken them in good faith equities which might be available against the original payee, provided they were not void in their inception.¹

When coupon bonds of a railroad company are made payable to bearer at a bank on a day specified, with interest upon the surrender of the bonds, interest runs on them from their maturity, and the holder need not aver or prove a demand at the bank, or an offer to surrender them. If an agent of the company was at the place at the time designated, and was ready and offered to pay the money, it would be matter of defense to the claim for interest to be pleaded and proved on his part.² If the contract of guaranty of a bond and coupons is not negotiable at law, it is assignable in equity, and an interest in it passes to each successive holder. The guaranty as an accessory of the bond or coupon follows and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon. In general, the guarantor contracts to pay if, by the exercise of due diligence, the debt cannot be made out of the principal debtor. If it appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor without the use of ordinary means to compel payment by him or proof of his

of city bonds to a railroad company in payment of the city's subscription to the stock of the company, directed that the bonds should be negotiable and transferable by the order of the president and directors of the company; and they were made payable to the company and its "assignee or bearer." It was held proper under the statute, as well as in accordance with the usage in reference to such instruments. *Maddox v. Graham*, 2 Metc. Ky. 56.

¹ *Durant v. Iowa County*, Woolw. C. C. 69; *Moran v. Commrs. of Miami County*, 2 Black. 722; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpeke v. Dubuque*, Ib. 176, 206; *Murray v. Lardner*, 2 Id. 110. See *Blake v. Livingston County*, 61 Barb. 149.

² *Langston v. South Car. R.R. Co.*, 2 Rich. S. C. N. S. 248; *Clarke v. Gordon*, 3 Rich. 313; *North Pa. R.R. Co. v. Adams*, 54 Pa. St. 94.

insolvency, his contract is a guaranty of punctual payment by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment after the usual means of enforcing the debt have been employed.¹

When coupon bonds having several years to run before they become due, are deposited as collateral security for the payment of promissory notes soon to mature, the presumption is that they were designed to be held as a pledge, and were expected to be sold after demand and notice, like goods, chattels, stocks, and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which, in the absence of any agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed that it was the intention of the parties thus to deal with them.²

§ 273. Nature and validity of coupons.—Coupons are written contracts for the payment of a definite sum of money on a given day, negotiable, because payable to bearer, and passing from hand to hand as other negotiable instruments.³ Whether the coupon expressly promises to pay the sum due on the bond for interest, or is in the form of a mere token or ticket, indicating the sum due, it answers substantially the same purpose, which is to afford to the holder evidence of his right to demand what is due on the bond, and a convenient mode of collecting it. To regard it as a bill of exchange would make it import a contract varying from that in the bond, and impose a degree of diligence on

¹ Arents v. Com., 18 Gratt. 750.

Bunting v. Camden & Atlantic R.R.

² Morris Canal & Banking Co. v. Co., 81 Id. 254.

Lewis, 12 N. J. Eq. (1 Beas.) 323; Same v. Fisher, 1 Stockt. Ch. 667; Winfield v. City of Hudson, 4 Dutcher, 255; Wheeler v. Newbould, 5 Duer, 29; Carr v. Le Fevre, 27 Pa. St. 413;

³ Aurora City v. West, 7 Wall. 82; Gelpcke v. Dubuque, 1 Id. 175. Like other negotiable instruments, they are entitled to days of grace. Evertson v. Nat. Bank of Newport, 66 N. Y. 14, per ALLEN, J.

the holder not in conformity with the general understanding and usage in respect to coupons. A coupon should not be regarded so as to produce these results, unless its language manifestly requires such a construction. The degree of diligence required of the holder is to be ascertained by reference to the relations of the parties liable for its payment.¹

A suit upon a coupon is not barred by the statute of limitations, unless the lapse of time is sufficient to bar also a suit upon the bond; the coupon, if in the usual form, being but a representation of the bond in respect to the interest.² Most of the bonds of municipal bodies and private corporations in this country are issued in order to raise funds for works of large extent and cost, and their payment is therefore made at distant periods, not unfrequently a quarter of a century. Coupons for the different instalments of interest are usually attached to these bonds, in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons when severed from the bonds are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become, in fact, independent claims. They do

¹ *Arents v. Com.*, 18 Gratt. 750; *First Nat. Bank v. County Commissioners*, 14 Minn. 77; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

² *Kenosha v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Id. 282; *Clark v. Iowa City*, 20 Wall. 583. The interest stipulated is a mere incident of the debt. The holder of the bond has an option to insist upon its payment when due, or to allow it to run until the maturity of the bond; that is, until the principal is payable. *Cromwell v. County of Sac*, 96 U. S. 51; *Williamsport Gas Co. v. Pinkerton*, *supra*. The mere presence of unpaid coupons upon the bond is not of itself

sufficient evidence of the dishonor of the bond to which they are attached. *Railway Co. v. Sprague*, 103 U. S. 756; *Nat. Bank of North Am. v. Kirby*, 108 Mass. 497; *Boss v. Hewitt*, 15 Wis. 260. See *Parsons v. Jackson*, 99 U. S. 434. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained on them. *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, Ib. 697; *Wallace v. McConnell*, 13 Pet. 136; *Irvine v. Withers*, 1 Stew. Ala. 234; *Montgomery v. Elliott*, 6 Ala. 701. See *Shaw v. Bill*, 95 U. S. 10.

not lose their validity if for any cause the bonds are cancelled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from its maturity. They then possess the essential attributes of commercial paper. When severed from the bonds to which they were originally attached, they are in legal effect equivalent to separate bonds for the different instalments of interest. The like action may be brought upon each of them when they respectively become due, as upon the bond itself when the principal matures.¹ A person who received coupons as an agent of exchange, and before any demand or notice from the rightful owner, transferred them by delivery and exchanged them for money, the amount of which he paid over to his employer, was held, considering the nature of the instruments, and the fact that he acted in good faith without gross negligence, or himself receiving any benefit from the transaction, not liable to an action for a wrongful conversion.²

¹ Clark v. Iowa City, 20 Wall. 583. See De Cordova v. Galveston, 4 Texas, 470; Thomson v. Lee County, 3 Wall. 327; Sewall v. Brainerd, 38 Vt. 364; Burroughs v. Richmond County, 65 N. C. 234. Where the coupon of a county bond named no person as payee, and was not made payable to bearer, it was held that its legal effect was that it was payable to the holder presenting it for that purpose. Johnson v. County of Stark, 24 Ill. 75. In Commissioners v. Aspinwall, 21 How. 539, 546, NELSON, J., in delivering the opinion of the court, said: "A question was made upon the argument that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for

the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time to permit complete evidence of the payment of the interest to the makers of the obligation." See White v. Vt. & Mass. R.R. Co., 21 How. 575, 577; Beaver v. Armstrong, 44 Pa. St. 63; Cicero v. Clifford, 53 Ind. 191.

² Spooner v. Holmes, 102 Mass. 503; Murray v. Lardner, 2 Wall. 110; Everts v. Nat. Bank, 66 N. Y. 14. An exception to the rule at common law that unless by a sale in market overt no one can give a better title to personal property than he has himself, was made at an early period on grounds of commercial policy in the case of securities transferable by delivery. The first reported case on the subject is in first

In an action against a railroad company to recover the aggregate amount of certain coupons with interest, it was contended by the defendant on demurrer that the coupons had no validity except as accessories of the bonds, and that as the bonds had been extinguished by payment, the coupons were also extinct. But as it appeared that the coupons were detached previous to the payment and surrender of the bonds, the court, in overruling the demurrer, said that as the coupons had thus lost their character as mere incidents of the bonds, and become an independent claim, payment of the bonds did not affect the validity of the coupons.¹ Coupons, however, notwithstanding they are

Salkeld, page 126, where it was held that an action of trover would not lie against the *bona fide* holder for value of a bank bill which the original owner had lost, "by reason of the course of trade, which creates a property-in the assignee or bearer." In Miller v. Race, 1 Burr. 452, the holder of a bank note recovered against the cashier of a bank, though the mail had been robbed of it, it appearing that the plaintiff came by it fairly, and upon a valuable consideration; Lord MANSFIELD putting the decision upon the ground of the course of business, the interests of trade, and that bank notes pass from hand to hand like coin. See Peacock v. Rhodes, 2 Doug. 633; Lawson v. Weston, 4 Esp. 56; Gill v. Cubitt, 3 Barn. & Cress. 466; Crook v. Jadis, 5 Barn. & Adol. 909; Backhouse v. Harrison, Ib. 1098; Goodman v. Harvey, 4 Adol. & Ell. 870.

¹ Nat. Exchange Bank v. Hartford, etc., R.R. Co., 8 R. I. 375. The following was held not negotiable as a separate and independent instrument: "Coupon No. 6, York & Cumberland R.R. Co. Bond, Certificate No. 149. On the 10th day of February, 1854, the York and Cumberland Railroad Company will pay thirty dollars on this

coupon at the office of said company in the city of Portland, Maine. Nath'l J. Merrick, treasurer." The court said: "The issue of bonds payable to bearer, with coupons or interest warrants attached, has become the almost universal resort and principal capital of railroad corporations; the country has been flooded with these securities, and we have no doubt that it would appear on inquiry that the custom has become general to pass such bonds from hand to hand as negotiable instruments. But whether coupons when disconnected from the bonds with which they were issued thus pass, we think is by no means so certain. No difficulty, however, is perceived in so framing coupons or interest warrants as to give them the character of negotiable instruments independent of the bonds to which they were originally attached, if the parties issuing such bonds and coupons so desire. But to give them that independent negotiable character without the interposition of legislation, the intention of the party issuing them must distinctly so appear on the face of the coupon itself." Myers v. York & Cumberland R.R. Co., 43 Me. 282. See Woods v. Lawrence Co., 1 Black. 386.

detached, are still a part of the mortgage debt, and the holder, upon a foreclosure of the mortgage, is entitled to share in the distribution *pro rata* with the holders of the remainder of the debt.¹ K., the president and a director of a railroad company, and also its creditor to a large amount, paid the coupons of the mortgage bonds of the company when presented at the office of the company for payment, it being understood between him and the company that the coupons were not extinguished, but that he had taken them up in order to preserve the credit of the company. The persons who presented the coupons at the counting-room of the company had no intention of assigning them to any one, but supposed that they were paid and extinguished in the regular course of business; and the transaction on the part of K. was without any design to induce the sale or purchase of the bonds. The mortgage had been regularly foreclosed, and the mortgaged property sold and converted into money. The proceeds of the sale were sufficient to pay the entire indebtedness of the company and leave a surplus in the hands of the trustees. The belief, however, that the company was able to pay and did pay its coupons, caused another railroad company, at a much later period, to vote to buy the mortgaged property, and with that view it purchased most of the bonds at or

¹ *Haven v. Grand Junction, etc., R.R. Co.*, 109 Mass. 88. Interest on interest may be recovered upon default in the payment of coupons when due. *Mills v. Jefferson*, 20 Wis. 50. COLE, J.: "When a person agrees to pay interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest on interest from the time he should have made the payment? If he undertakes to pay in a sum of money at a given time to the owner and makes default, the law allows interest on the sum

wrongfully withheld from the time he should have made such payment. The debtor withholds from the creditor his due as much when he fails to pay interest according to his contract, as when he makes default in the payment of the principal. It is not illegal to stipulate for the payment of compound interest, or that interest as it becomes due shall be converted into principal and bear interest." See *Kellogg v. Hickok*, 1 Wend. 521; *De Cordova v. Galveston*, 4 Texas, 470.

below par without interest. It was held that K. was entitled to be allowed for the amount of the coupons with interest as a charge against such funds as might remain in the hands of the trustees after payment of mortgage creditors and other claims.¹

There is a distinction between private and municipal corporations as to the right to issue commercial paper or bonds of that nature which pass by delivery. In general, private or trading corporations have the right to issue promissory notes, bonds, and other evidences of indebtedness unless restrained by their charters or the law of the land, for the reason that such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing of obligations therefor, are not only consistent with the objects of their organization, but essential to carry such objects into effect. Taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation, because such power is not necessary for the purposes for which it was created.² An action was brought by the holder of city bonds with coupons annexed to recover the interest that had accrued thereon since their date. In pursuance of the act of incorporation of the city the bonds were paid to a railroad company for stock in the company. The law did not require the railroad company to accept the bonds in payment for its stock, nor authorize them to be given to any particular person or corporation, or to be put in circulation as negotiable paper. The bonds might be delivered to any person who would furnish their par value as a loan to the city, or to the railroad company in payment for its stock. The act prohibited the common council from disposing of them for less

¹ *Haven v. Grand Junction, etc., R.R.* Pa. St. 278; *Williamsport v. Com.*, 84 Co., *supra*. Id. 487. See *Vicksburg v. Lombard*,

² *Com. v. Councils of Pittsburg*, 48 51 Miss. 111.

than their face, thereby placing the city, as a stockholder by means of the bonds, on an equality with the other stockholders who paid in cash. The bonds, which were made payable to bearer, were not assigned to the plaintiff by name. They were under the seal of the city, and not negotiable as bills of exchange or promissory notes. All right in them, either legal or equitable, must pass from the obligee by assignment or indorsement, by which the holder might acquire an interest in them sufficient to control them and receive their contents; but he could not sue in his own name, there being no statute in the State for the purpose. The bonds were signed by the mayor and countersigned by the treasurer of the city; while the coupons or interest warrants were signed by the treasurer alone, and did not purport to be obligations of the city, but had reference to the bonds to which they were attached. It was held that as the coupons had no legal force or validity at their inception independent of the bonds, and it was upon the bonds alone that the interest was recoverable, the suit must be dismissed.¹

§ 274. In case of fraud.—If there be fraud, irregularity, or non-compliance with the rules laid down by the authority which sanctions the issue of corporate bonds, the corporation may be restrained by injunction from issuing the bonds by any party in interest. In a suit against a railroad company, praying that the officers of the company be restrained from paying interest on its bonds, and that the bonds be declared void, it appeared that the bonds were given for a precedent debt; that, though made in North Carolina,

¹ Clarke v. Janesville, 1 Biss. 98. See McCoy v. Washington Co., 3 Wall. Jr. 381. In a suit brought on the coupons of county bonds delivered to a railroad company and by it paid to a *bona fide* holder for value, his right to recover is not affected by the fact that the rail-

road company sold the bonds at a discount, contrary to the provisions of its charter, which forbade the sale of them at less than their par value. Woods v. Lawrence County, 1 Black. 386; Mercer County v. Hacket, 1 Wall. 83. See Pendleton County v. Amy, 13 Id. 297.

where the precedent debt was incurred and payable, they were delivered and made payable in New York; that both parties resided in North Carolina; and that the bonds were secured by a mortgage on real property in the latter State. It was held that the bonds could legally bear no greater rate of interest than that allowed in North Carolina, and that the usury which the company agreed to pay consisted not alone in the excess of the legal rate of interest, but also in the difference between the actual debt and the amount in bonds given for its forbearance.¹

But it is too late after the bonds have passed into innocent hands to institute inquiries as to the qualifications of corporate electors, their number, or the day on which the election was held. All that can be required of a *bona fide* holder is a knowledge of the law authorizing the issue.² In an action against a railroad company on bonds of the company, and for the amount due on coupons attached to them, it is not sufficient to allege in defense that the books do not show value received for the bonds, or that the president has not made a return of the proceeds to the company, when it is not claimed that the bonds were obtained fraudulently.³

A corporation will be liable for damages sustained by a third person through fraud committed in a transaction within the apparent scope of its agent's authority. The principle that a party who, by his admissions, has induced a third person

¹ Commrs. of Craven v. Atlantic & N. C. R.R. Co., 77 N. C. 289. See Oxford Iron Co. v. Quinckett, 44 Ala. 487; Same v. Spradley, 46 Id. 98. Where a State was the mortgagee of the property and revenues of a canal company, but, desiring to aid in the completion of the work, while preserving, as far as was consistent with the relief proposed, the liens and priorities of the State, passed an act providing that the company might issue its bonds

to a specified amount, and that until said bonds with interest thereon should be fully paid, the liens of the State should be considered as waived, it was held that the term "interest" in the act meant simple interest, and not interest upon the interest coupons of the company. Com. v. Ches. & Ohio Canal Co., 32 Md. 501.

² San Antonio v. Lane, 32 Texas, 405.

³ Philadelphia, etc., R.R. Co. v. Lewis, 33 Pa. St. 33.

to act in a particular manner, is not permitted to deny the truth of his admissions, if the consequence would be to work an injury to such third person, was held to apply to and govern the following case: The agent in Chicago of the defendant, a railroad company, upon the delivery to him by M. of two forged warehouse receipts, gave to him bills of lading acknowledging the receipt from M. of a large quantity of lard consigned to the plaintiffs in New York to be transported to them there. The agent when these bills of lading were issued was told by M. that he intended using the same at a bank that day. M. drew his drafts on the plaintiffs, to which he attached the bills of lading, and they were paid by the plaintiffs on presentation. An action having been brought on the bills of lading, it was held that the plaintiff was entitled to recover.¹ In a case in Maryland, in which it was held that a railroad company was not responsible to consignees for advances made on bills of lading fraudulently issued by its agent for goods never received by it and never placed in its cars, the Court of Appeals said: "Is there any legal principle which makes the appellant responsible to a consignee for advances on a bill of lading fraudulently issued by its agent, who was also his consignor, for goods never in fact received by it and never placed in its cars? If any doctrine of commercial law can be regarded as well settled, it is that the master has no authority to sign a bill of lading for goods not actually put on board the vessel, and therefore the owner of the ship is not responsible to parties taking or dealing with or making advances on the faith of such an instrument which is untruthful in this particular. The consignee and every other party thus acting does so, with notice of this limitation of the power of the master, and acts at his own risk, both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be

¹ Armour v. Mich. Cent. R.R. Co., 65 N. Y. 111, EARL, C., dissenting.

shipped. . . . In later times similar documents have been commonly if not universally used by railway companies in land carriage. What good reason exists why this principle should not apply to them as well as bills of lading used in shipping? We see none. On the contrary, are there not much stronger reasons for its application to this class of documents? The master of a ship is necessarily clothed with a real as well as an apparent authority much more extensive than belongs to the station agents of a railroad company. His control over the vessel, his power to make contracts respecting it, his discretion in the use and management of it for the benefit of his owners on the high seas and in distant ports, reach far beyond those of the latter. A bill of lading signed by him and forwarded by mail oftentimes arrives at the port of destination months before the vessel and cargo, and the necessities as well as convenience of commercial transactions requiring its transfer and advances on the faith of it are much stronger than can possibly exist in dealing with similar instruments in railway transportation. In the latter but a few days usually intervene between the arrival of the bill of lading by mail and the goods by the cars; and, besides this, the telegraph is at hand, affording to any one asked to make advances on the faith of such documents, easy and speedy means of ascertaining whether the goods have been in fact laden in the cars or received at the depot of shipment or not. If, therefore, there be any good reason for exempting the owner of a vessel from responsibility for a bill of lading false in this respect signed by the master, who is his agent, it must apply *a fortiori* to a railway company with respect to similar acts of its station agents along its line of road.¹ The plaintiff having on the guaranty of a bank supplied J. D., a customer of the bank, with oats on the credit of a government contract, refused to continue to do so unless he had

¹ Baltimore & Ohio R.R. Co. v. Wilkens, 44 Md. 11.

a better guarantee. The manager of the bank thereupon gave him a written guaranty to the effect that the customer's check on the bank in plaintiff's favor in payment for oats supplied should be paid on receipt of the government money prior to any other payment except to the bank. J. D. was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff. The plaintiff thereupon supplied oats to the value of £1,227. The government money, amounting to £2,676, was received by J. D., and paid into the bank. But J. D.'s check for the price of the oats, drawn on the bank in favor of the plaintiff, was dishonored by the bank, which claimed to retain the whole sum of £2,676 in payment of J. D.'s debt to it. In an action by the plaintiff against the bank for false representation, and for money had and received, it was held that there was evidence to go to the jury that the manager knew and intended that the guaranty would be unavailing, and fraudulently concealed from the plaintiff the fact which made it so; that the bank was liable for the fraud of its agent; and that the fraud was properly charged in the declaration to be that of the bank.¹ Where con-

¹ Barwick v. English Joint Stock Bank, L. R. 2, Exch. 259. In this case, WILLES, J., said: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding

the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment in cases where officers of railway companies intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. It has been acted upon where persons employed by the owners of boats to navigate them, and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particu-

veyances executed to a party as trustee were secured by an illegal and oppressive exercise and use of the powers which belonged to his position as the acting president and almost the sole manager of a corporation, it was held that a court of equity would regard him as trustee for the grantors, although he might have intended to take the land as trustee for the corporation.¹

lar act, but he put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." See *Goff v. Gt. Northern R.R. Co.*, 3 E. & E. 672; 30 L. J. Q. B. 148; *Roe v. Birkenhead R.R. Co.*, 7 Exch. 36; *Kennedy v. Panama, etc., Mail Co.*, 2 Q. B. 580.

¹ *Union Pacific R.R. Co. v. Durant*, 3 Dillon, 343. If the contract is wholly unauthorized and illegal, it will, of course, be nugatory. In an action by the assignee of certain promissory notes, it appeared that the defendants were separate corporations existing under the laws of Indiana, created to construct distinct lines of railroad which met at Indianapolis in that State; that some time previous to the date of the notes the railroad companies were consolidated by agreement, and, having taken a name in common, they conducted the business of both lines under a common board of management; that while the business of the two corporations were thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat to be employed on the Ohio River to run in connection with the railroads; and that after the execution of the notes and the acquisition of the boat, this relation between the corporations was dissolved by due course of law,

and at the commencement of the suit each corporation was managing its own affairs. The plaintiff claimed that the two corporations were jointly bound for the payment of the notes. But the U. S. Circuit Court sustained a demurrer to the declaration, and the judgment was affirmed by the Supreme Court. CAMPBELL, J., in delivering the opinion of the latter court, said: "There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority." *Pearce v. Madison, etc., R.R. Co.*, 21 How. 441. When money has been paid upon an illegal contract, it is

§ 275. Personal liability of shareholders of private corporations.—Stockholders of a corporation may so conduct as to become responsible for the corporate debts. They may have originally contracted debts in the name and upon the credit of the corporation without any purpose of payment, or without any reasonable probability that payment could be made by the corporation ; or they may have diverted all of the corporate funds to their own use ; in either case showing a settled purpose to defraud creditors. But constructive fraud could not be predicated upon the mere fact of a stockholder's availing himself of his superior advantages to obtain security for debts due to himself to the exclusion of others.¹

As a general rule, members of corporations are not individually responsible for the corporate debts, the exception being where such liability is expressly imposed by law.²

a general rule that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid. But if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action. Comyns on Contr. 109; White v. Franklin Bank, 22 Pick. 181. "The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto* form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves moral turpitude, nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the

party making the advance : 1. Where it is not *in pari delicto*; or 2. In some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not ; and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto*." Tracy v. Talmage, 14 N. Y. 162, per SELDEN, J.; Smith v. Bromley, Doug. 670, note ; Jaques v. Golightly, 2 W. Black. 1073 ; Browning v. Morris, 2 Comp. 790 ; Jaques v. Withy, 1 H. Bl. 65 ; Williams v. Hadley, 8 East. 378 ; Worcester v. Eaton, 11 Mass. 368 ; Lowell v. Boston, etc., R.R. Co., 23 Pick. 24 ; Atlas Bank v. Nahant Bank, 3 Metc. 581 ; Mount v. Waite, 7 Johns. 434.

¹ Atty. Genl. v. Wilson, 1 Craig & Phillips, 1; Whitwell v. Warner, 20 Vt. 425.

² Shaw v. Boylan, 16 Ind. 384 ; Moyer v. Pennsylv. Slate Co., 71 Pa. St. 293.

When the charter of a corporation contains no individual liability clause, and no general statute of the State imposed such liability when the charter was granted, it is not in the power of a majority of the stockholders to create such a liability by a by-law.¹ In *Andover v. Flint*,² which was an action on a note, it appeared that the charter of a corporation imposed no personal liability upon the stockholders, but that they enacted the following by-law: "The members of this association pledge themselves in their individual as well as their collective capacity to be responsible for all moneys loaned to this association, and for repayment of which it may have given its obligation agreeably to the direction of the directors." This by-law was printed and distributed by the corporators, and F. executed the note in suit as treasurer. Judgment was obtained against the corporation, and execution issued and returned unsatisfied. An action having been brought against F. as a stockholder, the court, in deciding that he was not liable, said: "It is not, in the opinion of the court, within the powers conferred upon this and similar corporations to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as is specified in the charter, or in the general laws of the commonwealth. Such a power would be liable to great abuse, and would subject any member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation. . . . The proposed evidence (the declarations of the defendant that such liability existed) would therefore be inadmissible on the trial of this case before the jury, as it would not tend to charge the defendant. Whether for such false representations he may be held responsible to

¹ *Reid v. Eaton Manf. Co.*, 40 Ga. 98. the sale of pews, and from a lottery, do

² 13 Metc. 359. The proceedings of a vestry pledging the corporate funds to be derived from subscriptions, from not render the members of the vestry personally liable. *Vincent v. Chapman*, 10 Gill & Johns. 279.

those to whom he made them, or who may have lent their money on the faith of them, is a question not now before us." It is very clear that a by-law could not impose such a liability on a stockholder without his consent.

The liability of a stockholder for the debts of the corporation, in the cases provided by the charter or by some statute, is in the nature of a conditional suretyship—a liability to pay the corporate debts in certain contingencies if the corporation does not pay them.¹ Under a statute making the stockholders personally liable for the debts of the corporation, they stand substantially upon the same footing in this respect, as though they were partners or members of an unincorporated association.² The individual liability of stockholders of manufacturing corporations under the statute of New York is based on a contract between the stockholders and the creditors of the company. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the stock is all paid up, and a certificate to that effect is made, published, and recorded. The fact that the liability ceases when these events take place, does not change its nature, and make it a penalty.³ In Ohio, in an action

¹ Manchester Bank v. White, 30 N. H. (10 Fost.) 456; Gray v. Coffin, 9 Cush. 192; Trustees, etc., v. Flint, 13 Metc. 539; Reid v. Eaton Manf. Co., 40 Ga. 98; Coleman v. White, 14 Wis. 700; Wickson v. Nesmith, 46 N. H. 371. A stockholder who simply holds his stock, is estopped, when pursued by a creditor of the supposed corporation, from denying the corporate existence. He is like one who having held himself out, or suffered himself to be held out, as a copartner, may be charged with the partnership debts; or like a person who, without authority as executor or administrator, intermeddles with the property of a decedent, and

so becomes chargeable as executor in his own wrong. Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112. See Utley v. Union Tool Co., 11 Gray, 139.

² Corning v. McCullough, 1 Comst. 47; Norris v. Wrenshall, 34 Md. 492; Harger v. McCullough, 2 Denio, 119.

³ Flash v. Conn., 109 U. S. 371; 16 Fla. 428. A corporation, being indebted to more than double the amount of its capital and assets, the stockholders subscribed an agreement to pay to the treasurer of the company the sums placed opposite their names respectively, for the purpose of liquidating the debt. All of the subscribers

brought to charge certain stockholders and directors of a corporation, upon an individual liability imposed by statute, to pay the amount of certain notes issued by the corporation, so made as to circulate as money, it was held that the liability was not in the nature of a contract, but of a penalty, an action on which would be barred in four years.¹ In New York, under an act making the trustees of an incorporated company jointly and severally liable for its debts, in case of neglect to make and file the report mentioned in the act, it was held that one trustee, who had paid for the company a large sum of money at its request, could not by reason of this liability recover of his co-trustees a proportionate amount, for the reason that, where the liability arises *ex delicto*, there is no contribution among the wrong-doers.²

Corporators may by the charter enjoy every immunity from liability upon or for corporate obligations, or they may be made liable absolutely, and to the fullest extent, for every corporate debt, the same as if no corporation existed; and there may be every shade and degree of liability, either personal or of property, between the two extremes. The legislature, in qualifying and modifying corporate rights and individual liability, may prescribe the limits of each, as well as the forum in, and the proceedings by which any liability imposed may be enforced. The intent of the legislature is the foundation of the liability, which is to be ascertained from the language of the statute.³ Under a statute

but one paid as they agreed, and the corporate business went on for three or more years thereafter, when, the business being abandoned, an action was brought by the treasurer against the delinquent subscriber for the benefit of those who were creditors of the corporation at the time of the subscription. It was held that the plaintiff was entitled to recover. Haskell v. Oak, 75 Me. 519. See Ray v. Powers, 134 Mass. 22.

¹ Lawler v. Burt, 7 Ohio St. 340. See

Sturgess v. Barton, 8 Id. 215; Union Iron Co. v. Pierce, 4 Biss. 327.

² Andrews v. Murray, 33 Barb. 354. See Shaler, etc., Quarry Co. v. Bliss, 34 Id. 309; Garrison v. Howe, 17 N. Y. 468; Boughton v. Otis, 21 Id. 261; Chambers v. Lewis, 28 Id. 454.

³ Lowry v. Inman, 46 N. Y. 119. A statute making members of a corporation personally liable for the corporate debts, must be construed strictly. Gray v. Coffin, 9 Cush. 192.

making stockholders liable for debts of the corporation due to its "laborers, servants, and apprentices, for services rendered the corporation," it was held that a person employed at a yearly salary as a bookkeeper was not included; that the services referred to were menial or manual; that he who performed them must belong to a class whose members usually looked for the reward of a day's labor or service for immediate or present support, from whom the corporation did not expect credit, and to whom its future ability to pay was of no consequence; one who was responsible for no independent action, but who did a day's work or a stated job under the direction of a superior.¹ An assistant chief engineer of a railroad company is not a "laborer," within the meaning of the constitution of Michigan, providing that stockholders shall be liable for the labor debts of a corporation;² nor a traveling salesman or agent soliciting orders for the sale of a company's goods from customers.³ In the same State, where the quarrying operations of a company were farmed out to a stranger, who received pay, not for the amount of labor done, but for the amount of stone delivered, the corporation having no voice in the proceedings, it was held that he was not a laborer within the statute making stockholders liable.⁴ In New York, an action was brought to enforce the personal liability of the defendant as a stockholder in an incorporated stone company for services alleged to have been rendered by C. as a laborer and servant in the employment of the company. It was

¹ *Wakefield v. Fargo*, 90 N. Y. 213. But under an act incorporating a newspaper association, providing that the corporation should be jointly and severally individually liable for debts owing to laborers, servants, and apprentices for services rendered in behalf of the corporation, it was held that a reporter and a city or assistant editor were laborers or servants within the mean-

ing of the act. *Harris v. Norvell*, 1 Abb. N. C. 127. See *Conant v. Van Shaick*, 24 Barb. 87; *Aiken v. Wasson*, 1b. 482; *Ericsson v. Brown*, 38 Id. 390; *Williamson v. Wadsworth*, 49 Id. 294; *Coffin v. Reynolds*, 37 N. Y. 640.

² *Brockway v. Innes*, 39 Mich. 47.

³ *Jones v. Avery*, 50 Mich. 326.

⁴ *Taylor v. Manwaring*, 48 Mich. 171.

proved that C. applied to the company for a situation, and was told that it would give him one if he would procure it a loan of \$3,000, which he did, and began work for the company at \$1,000 a year, payable monthly, or as he wanted his pay ; that he acted as foreman, took part in the manual labor required to manufacture the stone, kept the time of the men, solicited orders, collected bills, and did whatever was required of him. It did not appear that the amount of his compensation was increased by the fact that he was to procure the loan ; no time was fixed during which his engagement was to continue ; and for aught that appeared the sum agreed to be paid was no more than a reasonable compensation for his services aside from the procuring of the loan. It was held that C. was to be regarded as a laborer or servant within the meaning of the statute.¹

Where stockholders are individually liable for the indebtedness of the corporation to the nominal amount of their stock, a subscriber for shares is liable for the corporate debts, although he has made no payment on his subscription, or done any act as a stockholder.² Members of a corporation who would be liable, if they continued members, to the creditors of the corporation, will still be treated as members if they have disposed of their interest to an insolvent with a view of exonerating themselves from responsibility.³

¹ Short v. Medberry, 29 Hun, 39. See Erwin v. Neversink Steamboat Co., 23 Id. 573, 577.

² Spear v. Crawford, 14 Wend. 20.

³ McCaren v. Franciscus, 43 Md. 452; Provident Savings Inst. v. Jackson Place Rink, 52 Id. 557; Miller v. Gt. Republic Ins. Co., 50 Id. 551. See Cowles v. Cromwell, 25 Barb. 413; Matter of Reciprocity Bank, 29 N. Y. 9. By the law under which a bank was organized stockholders, while they were such, and for one year thereafter, were individually liable for the debts of the

bank to an amount equal to double the stock owned by them. In an action by a creditor of the bank against a stockholder it appeared that the defendant upon demand of payment requested delay, promising not to transfer his stock; but that he did transfer it fraudulently and without consideration, and that more than a year elapsed after such transfer before the suit was commenced. It was held that, as against the plaintiff, the transfer of the stock was inoperative. Paine v. Stewart, 33 Conn. 516.

Where shares of stock in a national bank have been hypothesized and placed in the name of the transferee, he will be subjected to all of the liabilities of an ordinary owner. A party loaned money to a bank, and made and delivered to it his promissory note, partly as an accommodation, to be held among its other assets. It was agreed that fifty shares of stock in the bank, equal in value to \$5,000, should be issued to him as collateral security for the loan and as indemnity against liability on his promissory note held by the bank. That number of shares was in fact issued to him and certificates given upon which he received, at different times, semi-annual dividends. It was held that in relation to the creditors of the bank he occupied the position of a stockholder, and must bear all the burdens that relation imposed.¹

A State statute repealing a former statute which made the stockholders in a corporation liable for the corporate debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void.² A State constitution having provided that "in all cases each stockholder shall be individually liable over and above the stock by him or her owned and any amount unpaid thereon, in a further sum at least equal in amount to such stock," a railroad company incurred debts. The company was afterward consolidated with another railroad company, the new company assuming the debts of the old one, and being authorized to obtain subscriptions for additional stock. Before, however, any new subscriptions were made, the constitution in an amendment declared that

¹ *Wheelock v. Kost*, 77 Ill. 296. See *Adderly v. Storm*, 6 Hill, 624; *In re Empire City Bank*, 18 N. Y. 199. Where under the constitution of a State a law is required to impose some indeterminate liability upon the stockholders of a corporation, the liability must be imposed, at whatever rate it may be fixed, upon all alike, and a greater or less lia-

bility cannot be attached to the stockholders of one corporation than to the stockholders of another. *French v. Teschemaker*, 24 Cal. 518. See *Young v. Rosenbaum*, 39 Id. 646; *Larrabee v. Baldwin*, 35 Id. 155.

² *Hawthorne v. Calef*, 2 Wall. 10; *Provident Savings Inst. v. Jackson Place Rink*, 52 Mo. 557.

"in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." It was held that the holders of the new stock were not individually liable under the provisions of the constitution previous to the amendment. DAVIS, J., said : "The law of the contract in this case undoubtedly gave the plaintiff the right to subject existing stockholders in the corporation with whom the debt was contracted to the double liability provision. This provision could be invoked so soon as the assets of the corporation were exhausted. The plaintiff trusted this corporation and the members composing it at the time the contract was made. It cannot be said that he gave credit beyond this ; for what right had he to assume that other stock would be taken ? It may be that he expected this would be done, and that thereby his security would be increased ; but the obligation of a contract within the meaning of the constitution is a valid subsisting obligation, not a contingent or speculative one."¹

§ 276. Individual liability of members of public corporations.

—During the early history of Connecticut, all ecclesiastical societies having territorial limits were regarded as municipal and public corporations. They were originally coextensive and identical with the several towns, and when, in many instances, they became separate communities, they still retained their public and political character. To support and maintain religious instruction and worship through the agency of these societies was a public duty enjoined by law ; as much so, as to promote education by means of common schools ; or to support the poor, and maintain roads and bridges through the agency of towns. Every individual residing within the limits of such society was considered as much a member of it, as each resident of a town was deemed its inhabitant, except only in cases where individuals by

special legal indulgence were excused from taxation for the religious objects of the society.¹ In Massachusetts the question whether, on an execution against a town or parish, the body or estate of any inhabitant might be lawfully taken to satisfy it, was settled in the affirmative by a series of decisions, on the ground that as towns and other such *quasi* corporations have no corporate fund, and no means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation.² In Beardsley v. Smith³ the Supreme Court of Connecticut said: "We know that the relation in which the members of municipal corporations in this State have been supposed to stand in respect to the corporation itself, as well as to its creditors, has elsewhere been considered as somewhat peculiar. We have treated them for some purposes as parties to corporate proceedings, and their individuality has not been considered as merged in the corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts. . . . Such corporations are of a public and political character. They exercise a portion of the governing power of the State. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities which can only be discharged by a resort to individuals, either by taxation or execution. Taxation in most cases can only be the result of the voluntary action of the corporation dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it." It was said by the judge delivering the opinion in a case in Massachusetts: "School districts, so far as they are corporations of the same kind as

¹ Jewett v. Thames Bank, 16 Conn. Id. 405; Adams v. Wiscasset Bank, 1 511, per CHURCH, J. Me. 364.

² Chase v. Merrimack Bank, 19 Pick. ³ 16 Conn. 368. 564. See Merchants' Bank v. Cook, 4

towns, and organized for the same purposes, are charged with the same duties; and therefore the court is of opinion that, when judgment is recovered against them, the individual inhabitants are liable for the satisfaction of the execution on such judgment, in the same manner as the inhabitants would be for a similar judgment and execution against the town. The judgment creditor has his election, in the first instance, to levy upon the corporate property, or on the property of one or more of the members."¹

§ 277. Form and nature of proceedings against stockholders.—In many charters the intent is obvious to impose an absolute liability on the stockholders. In all such cases the liability may be enforced like other personal obligations according to the course of procedure in the place where the individual sought to be charged is found. It is not in such case a statutory remedy, or a liability based upon a statute, and which is confined in its operation to the limits of the sovereignty creating the corporation, and without extraterritorial force and obligation. It is like other obligations assumed in the form prescribed by the laws of the place where made, and being valid there, is enforceable everywhere. Its validity, interpretation, and effect are to be determined by the *lex loci*; but the remedy is governed by the *lex fori*.² Under a statute providing that when the whole capital of a corporation shall not be paid in, and the capital paid shall not be sufficient to satisfy the claims of the creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the corporation, or such proportion of that sum as shall be required

¹ Gaskill v. Dudley, 6 Metc. 546, per SHAW, C. J. Citizens of a town are not individually liable for the existing debts of the town after, by a change of its boundaries by an act of the legis-

lature, they become residents of a different town. North Lebanon v. Arnold, 47 Pa. St. 488.

² Lowry v. Inman, 46 N. Y. 119, per ALLEN, J.

to satisfy the creditors of the corporation ; no one creditor can maintain an action against an individual stockholder, for the reason that the liability is to the creditors generally. The proceeding must therefore be in equity, in which all of the creditors should join, or one or more should sue for the benefit of all, and all the stockholders be made parties defendant unless it is impossible to bring them all before the court, or some other sufficient cause is shown.¹

¹ Griffith v. Mangam, 42 N. Y. Super. Ct. 369 ; S. C. 73 N. Y. 611 ; Coleman v. White, 14 Wis. 700 ; Umsted v. Buskirk, 17 Ohio St. 113 ; Aspinwall v. Torrance, 1 Lansing, 381 ; Paine v. Stewart, 33 Conn. 516 ; State Savings Assoc. v. Kellogg, 63 Mo. 540. See Pettibone v. McGraw, 6 Mich. 441 ; New England, etc., Bank v. Newport Steam Factory, 6 R. I. 154 ; Matter of Hollister Bank, 27 N. Y. 393 ; Planters' Bank v. Bivingsville Cotton Manf. Co., 10 Rich. 95 ; Crease v. Babcock, 10 Metc. 525 ; Morgan v. N. Y. & Alb. R.R. Co., 10 Paige Ch. 290 ; Mann v. Pentz, 3 N. Y. 416 ; Atwood v. Agr. Bank, 1 R. I. 376 ; Bassett v. St. Albans Hotel Co., 47 Vt. 313 ; Hornor v. Henning, 93 U. S. 228. A stockholder whose liability is sought to be enforced, has the right to insist that his co-stockholders shall be made parties for the purposes of a general account, and to enforce from them contribution in proportion to their shares of stock. Umsted v. Buskirk, *supra* ; Mathews v. Albert, 24 Md. 527 ; Stewart v. Lay, 45 Iowa, 604 ; Hadley v. Russell, 40 N. H. 109. In New Hampshire, by the act of 1857, ch. 1962, it was provided that "all legal proceedings hereafter commenced against any individual stockholder in any corporation in this State for the collection of a debt against said corporation, shall be by a bill in chancery and not otherwise." By this statute it was designed to com-

pel the creditor to make all the stockholders parties to his bill if practicable, and not to allow him to pursue his remedy against any one and collect his whole debt from such single stockholder where there were others equally liable. Erickson v. Nesmith, 46 N. H. 371. In New York, when the charter of a corporation permits creditors to sue stockholders in any court having jurisdiction, the liability of the stockholders may be enforced in equity. A supplemental bill may be maintained, and the liability be enforced conjointly with a suit against the corporation. The remedy against the stockholders need not await the result of a decree for a distribution of the property of the corporation. The liability is several as well as joint; is for the whole of the debts and not restricted to the amount of stock owned by the party; and it is absolute upon the return of an execution at law against the corporation unsatisfied. Masters v. Rossie Lead Mining Co., 2 Sandf. 301. Where the statute renders stockholders, in cases of fraudulent insolvencies, liable to the creditors of the corporation to the extent of their stock, if there be a deficiency in the effects of the corporation, no one of the creditors can collect the whole of his debt from those who are liable. The proceedings to compel a ratable contribution to the amount of their several debts are analogous to those against the estate of an insolvent

The intention of the statute of Massachusetts of 1862 making stockholders liable for the debts of the corporation incurred before the capital was fully paid in, was to protect third persons dealing with the corporation in the faith that its financial condition was what it would be with all of its capital, and its affairs managed according to the requirements of law. The remedy was designed to enforce the liability of stockholders in favor of outside parties, and not to adjust the conflicting and complicated claims of stockholders among themselves upon a final settlement of the corporate affairs. The requirement that all stockholders must be joined as defendants, implied that those who were plaintiffs were creditors only, and not stockholders.¹ Under similar provisions in a previous statute it was held that a creditor who was also a stockholder individually liable for the debts of the corporation, could not take the property of other stockholders equally so liable, but must resort to his bill in equity against them for contribution. It was said that such a stockholder was not one having a debt against the corporation which, as respected him, the other stockholders were severally liable to pay, but that their ultimate liability to him was only to pay their proportionate part of the debt.²

testator or intestate in the hands of his personal representative. But when the statute makes each stockholder personally liable to every creditor for the full amount of his debt without reference to the amount of stock held by the stockholders respectively, an injunction will not be granted a stockholder restraining all the other creditors from proceeding at law against any of the defendants in that suit. *Judson v. Rossie Galena Co.*, 9 Paige Ch. 598.

¹ *Potter v. Stevens*, 127 Mass. 592.

² *Thayer v. Union Tool Co.*, 4 Gray, 75. The statute of Massachusetts of

1870, prohibiting a corporation from transacting business until the whole amount of the capital stock has been paid in and a certificate of the fact filed in the office of the secretary of state, does not prevent an action from being maintained and judgment rendered against the corporation upon a debt contracted before the filing of the certificate; and the members of the corporation may be sued in equity for such a debt after recovering against the corporation. *First Nat. Bank v. Almy*, 117 Mass. 476. The bankruptcy of the corporation, and proof of a claim against its estate, does not dissolve the corpora-

In Illinois, under an act providing that stockholders should be individually liable to creditors of the corporation to an amount equal to the stock held by them respectively, for debts and contracts made by the corporation prior to the time when the whole capital stock was paid in, and a certificate thereof filed, it was decided that the liability was cognizable at law on an implied promise.¹ In Georgia, in an action against the stockholder of a bank who was subject to a similar liability, it was held that the creditor might proceed either in equity, or at law, and if at law could adopt any form of action appropriate to such a case which was most convenient and advantageous to himself.²

§ 278. Proof required to charge stockholders personally.—The principle that whoever enters into a contract with a *de facto* corporation is estopped from denying the corporate existence or from inquiring into irregularities attending its formation to defeat the contract, is applicable to stockholders seeking to avoid a liability to creditors of the corporation.³ Under a statute providing that stockholders

tion, or prevent the plaintiff from recovering judgment against it for so much of his debt as remains unpaid for the purpose of charging its officers and stockholders. Chamberlin v. Huguenot Manf. Co., 118 Mass. 532.

¹ Culver v. Third Nat. Bank, 64 Ill. 528.

² Adkins v. Thornton, 19 Ga. 325. See Phillips v. Therasson, 11 Hun, 141; Glahn v. Harris, 73 N. C. 323; Same v. Latimer, Ib. 333. Where an action at law cannot be maintained by a creditor of a corporation against its officers to enforce a liability imposed by statute, the objection to the form of action is not waived by a submission of the matter upon an agreed statement of facts; and the plaintiff will not be permitted to amend in the appellate court by changing the action to a suit in equity. The corporation is a

necessary party. McRae v. Locke, 114 Mass. 96. In Iowa, the Code of 1873, section 1084, provides that before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him in any stage of which he may point out corporate property subject to levy; and upon his satisfying the court of the existence of such property by affidavit or otherwise, the cause may be continued, or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property. Bayliss v. Swift, 40 Iowa, 648. See Stewart v. Lay, 45 Id. 604.

³ Centr. Agricultural, etc., Assoc. v.

should be severally and individually liable to the creditors of the corporation to an amount equal to the capital stock held by them, it appeared that a party originally subscribed for fifteen shares of the par value of fifteen hundred dollars, but that at the first meeting of the board of directors, before any debts had been incurred by the corporation, he made application to have his subscription reduced from fifteen to ten shares, which was assented to. It was held that if he was to be deemed liable as a stockholder on the ground of having participated in the organization and business of the company, knowing it was incurring debts for the purchase of property necessary to carry on the business of the company, he could not be liable for any greater amount than the par value of the stock held by him, and upon the basis of which he participated in the affairs and business of the company; that the mere fact that he paid his subscription knowing that the whole capital stock had not been paid in, and that the company was incurring debts, were not such acts of participation as to estop him from setting up as a defense the partial subscription of the capital stock; that where a stockholder attended the meetings of the corporation knowing that the whole capital stock had not been taken, and voted for the expenditure of money for the purchase of property and materials necessary to carry on the business of the corporation, he would be estopped from setting up as a defense the fact that the whole capital stock had not been taken, but that there must have been some act or participation on his part, upon the faith of which debts were contracted, to estop him from setting up such a defense.¹ Where, under a statute providing that the officers of manufacturing corporations should be jointly and severally liable for its debts, the persons

Ala. Gold Life Ins. Co., 70 Ala. 120; v. Aspinwall, 19 N. Y. 119; Chubb v. Lehman v. Warner, 61 Id. 455; Eaton Upton, 95 U. S. 666.

¹ Garling v. Baechtel, 41 Md. 305.

joined with it as defendants were acting as directors during the whole period within which the debts were contracted, it was held that they were liable as such, notwithstanding the irregularity or informality of the meetings at which they were elected, and that a judgment against the corporation was conclusive as to the existence of the debt for which it was rendered.¹ The declarations of a member that he was individually liable, would not be admissible in an action against him by the creditors of the corporation, as he might have mistaken his legal rights.²

Under the statutes of New York,³ requiring the entire capital stock of moneyed and manufacturing corporations organized under the general laws for that purpose to be paid in money, and a certificate thereof to be filed by the trustees, and providing that stockholders should remain individually liable for the corporate debts, until these conditions were complied with, subject only to the exception that the trustees of such companies might in good faith purchase property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and that the holders of stock thus issued should be exempt from liability for the debts of the corporation, to charge a holder of stock, issued for the purchase of property, individually for the debts of the company, two facts must be established: 1st, that the stock issued exceeded in

¹Thayer v. New England Lithographic Co., 108 Mass. 523. See Tyng v. Clarke, 9 Hun, 269; Hastings v. Drew, 76 N. Y. 9; Miller v. White, 50 Id. 137, reversing 59 Barb. 434; 10 Abb. Pr. N. S. 385; McMahon v. Macy, 51 Id. 155. Where the charter of a bank provided that the stockholders should be liable for the debts and liabilities of the bank, and that a judgment against the bank might be enforced by a levy on the property of the stockholders, it was held that each debt

contracted by the bank was a debt of the stockholders, each suit against the bank a suit against them, notice to the bank notice to them, and the judgment conclusive as to them. Lowry v. Parsons, 52 Ga. 356. See Boyd v. Hale, 56 Id. 563; Dodge v. Minnesota Plastic Slate Roofing Co., 16 Minn. 368.

²Trustees, etc., v. Flint, 13 Metc. 539; Reid v. Eaton Manf. Co., 40 Ga. 98.

³Laws of N. Y. of 1848, ch. 40, and of 1853, ch. 33.

amount the value of the property in exchange for which it was issued ; and 2d, that the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value. Proof that the property was purchased and paid for at an overvaluation through a mistake or error of judgment on the part of the trustees, would be insufficient. It must be shown that the purchase was made in bad faith, and to evade the statute. The payment of an amount for property in excess of its value deprives creditors and the public of the security contemplated by the statute, and is a fraud upon them. The value of the property may be determined, in any action in which the question arises, upon the evidence having respect to the circumstances and the nature of the property ; and the scienter and guilty action of the trustees may be proved either directly, or be inferred from circumstances.¹

§ 279. Limitation of time of action against stockholders.—A judgment against a corporation does not itself operate to prolong the time in which an action may be brought against the stockholders.² Under the act of New York, making the stockholders of a plank road company liable for its debts, and providing that a creditor prosecuting the company might include one or more of the stockholders, but in case of recovery against the company and the stockholders no execution should be levied on the property of the latter except for such deficiency as might remain unsatisfied after the property of the company had been levied on and applied thereto, it was held that the moment the right of action accrued against the company it accrued against each stockholder, and unless the action was commenced within the time prescribed by the statute of limita-

¹ Douglass v. Ireland, 73 N. Y. 100; v. Andrews, 63 Id. 93; Schenck v. An-
Boynton v. Hatch, 47 Id. 225; Boynton drews, 57 Id. 133.

² Stephen v. Ware, 45 Cal. 110.

tions, it was barred.¹ Under a statute providing that stockholders should be individually liable to the creditors of the corporation to an amount equal to the stock held by them respectively for all debts and contracts made by the corporation, until the whole capital stock was paid in, and a certificate made and recorded, and that the capital stock should be all paid in within two years, or the corporation be dissolved, it was held that the statute of limitations began to run from the expiration of the two years.² Where a negotiable promissory note payable on time was given by a corporation for its indebtedness, and when this note matured it was taken up by another similar note, it was held that the date of the latter note must be regarded as the time when the indebtedness accrued, so far as it related to the individual liability of the stockholders.³

¹ Conklin v. Furman, 48 N. Y. 527, EARL, C., dissenting.

² Phillips v. Therasson, 11 Hun, 141. See Booth v. Campbell, 37 Md. 522.

³ Milliken v. Whitehouse, 49 Me. 527.

CHAPTER XVI.

CORPORATE LIABILITY FOR WRONGS.

<p>§ 280. General liability of corporations for torts.</p> <p>281. Libel.</p> <p>282. Malicious prosecution.</p> <p>283. Misrepresentations of agent.</p> <p>284. Nuisance.</p> <p>285. Injury from improper interference with highway on street.</p> <p>286. Injury at railroad crossings.</p> <p>287. Interference with natural flow of water.</p> <p>288. Causing death of person.</p> <p>289. Forceable removal of passenger from public conveyance.</p> <p>290. Loss of freight.</p> <p>291. Injury of passenger by railroad accident.</p> <p>292. Duty of corporation to keep its works in a safe condition.</p>	<p>§ 293. Injury of employé from defective machinery.</p> <p>294. Injury by co-employé.</p> <p>295. Injury in case of contributory negligence.</p> <p>296. Damage done by contractor.</p> <p>297. Injury by receiver.</p> <p>298. Liability of <i>quasi</i> corporations for neglect of duty.</p> <p>299. Injury of personal property.</p> <p>300. Wilful acts of agent.</p> <p>301. Damages for injury to property.</p> <p>302. Damages in case of personal injury.</p> <p>303. Mental suffering as an element of damages.</p> <p>304. Damages where injuries cause death.</p> <p>305. Exemplary damages.</p>
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§ 280. **General liability of corporations for torts.**—The doctrine that as a corporation has no soul and cannot do an act involving moral qualities, it cannot be held responsible for tort, is no longer maintained;¹ and it is now deemed liable *civiliter*, the same as a natural person, for the tortious acts of its servants or agents in the course of their employment,

¹ Johnson v. St. Louis Despatch Co., 2 Mo. App. 565. In Orr v. Bank of U. S., 1 Ohio 36, decided in 1821, it was held that a corporation could not be sued for assault and battery; and in Childs v. The Bank, 17 Mo. 213, determined in 1852 that a corporate body was not liable for malicious prosecu-

tion. In Foote v. Cincinnati, 9 Ohio 31, it was held that trespass *quare clausum fregit* would not lie against a corporation, which doctrine was repudiated in Turnpike Co. v. Rutter, 4 Serg. & Rawle, 6, and in McCready v. Guardians of the Poor, 9 Id. 94.

committed by the authority of the corporation express or implied, whether such acts fall within the designation of forcible, negligent, malicious, or fraudulent torts, and without regard to the form of action by which the appropriate remedy is sought.¹ In relation to corporate liability for torts under ordinary circumstances and apart from questions of *ultra vires*, it makes no difference whether the corporation is a trading one, making profits out of its undertaking,

¹ *Brokaw v. N. J. R.R. & Transp. Co.*, 32 N. J. 328; *Fishkill Savings Inst. v. Nat. Bank of Fishkill*, 80 N. Y. 162; *Bissell v. Mich. Southern, etc., R.R. Cos.*, 22 Id. 305; *N. Y. & New Haven R.R. Co. v. Schuyler*, 34 Id. 30; *Mott v. Consumers' Ice Co.*, 73 Id. 543; *U. S. v. Balt. & Ohio R.R. Co.*, 7 Am. L. Reg. N. S. 757; *U. S. v. Memphis, etc., R.R. Co.*, 6 Fed. Rep. 237; *In re Tift*, 11 Id. 463; *State v. Balt. & Ohio R.R. Co.*, 15 W. Va. 362; *Phila., etc., R.R. Co. v. Derby*, 14 How. 468; *Same v. Quigley*, 21 Id. 202; *Balt. & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *South & North Ala. R.R. v. Chappell*, 61 Ala. 527; *Alexander v. Relfe*, 74 Mo. 495; *Boogher v. Life Assoc. of Am.*, 75 Id. 319; *Vance v. Erie R.R. Co.*, 32 N. J. (3 Vroom) 334; *Fenton v. Wilson Sewing Machine Co.*, 9 Phila. 189; *Hewitt v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Id. 580; *Moore v. Fitchburg R.R. Co.*, 4 Gray, 465; *Monument Nat. Bank v. Globe Works*, 101 Mass. 59; *Ramsden v. Boston & Alb. R.R. Co.*, 104 Id. 117; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; *Hays v. Houston, etc., R.R. Co.*, 46 Texas, 272; *Western Union Tel. Co. v. Eyser*, 2 Col. 141; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Carman v. Steubenville, etc., R.R. Co.*, 4 Ohio St. 399; *Lyman v. White River Bridge Co.*, 2 Aiken Vt. 255; *First Baptist Church v. Schenectady, etc., R.R. Co.*, 5 Barb. 79. *In an action*

of trover against a railroad company for a wagon, it appeared that the wagon being in possession of M. and used by him with the consent of the plaintiff the owner, the president of the company procured an attachment against M. to collect a note against him for \$100, and gave the writ to a constable to serve; that C., an employé of the company, was directed by the president to assist the constable in serving the writ, the latter being told to act under C.'s instructions; that a horse of M. was attached and placed in the company's stables, and the same day it was agreed between C. and M. that the company should take the horse at \$50, and M. give C. a bill of sale of the wagon, who was to sell it to the best advantage, retain \$50 of the proceeds of the sale, and pay over the balance to M.; that the bill of sale of the wagon was made, and the wagon delivered to C., who reported his doings immediately to the president of the company, at the same time paying him \$50; that M.'s note was given up to C., the horse taken possession of by the company, and the suit withdrawn before the return day of the writ. It was held that the foregoing facts constituted an agency on C.'s part, and a ratification of his acts by the company, and the plaintiff was entitled to judgment against it for the value of the wagon and his costs of suit. *Dunn v. Hartford & Wethersfield R.R. Co.*, 43 Conn. 434.

or exists merely for public purposes. In the latter case as in the former, it is equally under obligations to all persons with whom it may come into contact, and is bound so to conduct its affairs as to keep within its powers, and not to cause injury to others. Failing this, it is responsible for the damages thereby resulting.¹

¹ Green's Brice's *Ultra Vires*, 2d Am. Ed. 331. See *Cumberland*, etc., *Canal Corp. v. Portland*, 56 Me. 77; *Hutchinson v. Western*, etc., *R.R. Co.*, 6 *Heisk. Tenn.* 634; *Brown v. South Ken. Agrl. Soc.*, 47 Me. 275. In *Phila.*, etc., *R.R. Co. v. Quigley*, 21 *How.*, *CAMPBELL*, J., in delivering the opinion of the court, said: "With much weariness, and after close and exact scrutiny into the nature of their constitutions, have the judicial tribunals determined the legal relations which are established for corporations by their governing bodies and agents with natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents of nearly every variety." See *Addison on Wrongs*, 721, 722. In *Nat. Bank v. Graham*, 100 U. S. 699, *SWAYNE*, J., in delivering the opinion, said: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal in the same manner and to

the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence." In *State v. Morris & Essex R.R. Co.*, 23 N. J. (3 Zab.) 360, in which an indictment against a railroad company was sustained for erecting a depot on a public highway, *GREEN*, C. J., in delivering the opinion of the court, remarked: "It is said that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of a corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said that if a corporation has itself no hands with which to strike, it may em-

The fact that an incorporated road and bridge company was by a subsequent act of the legislature permitted to form itself into two distinct companies, one designated a turnpike road company, and the other a bridge company, was held not to exonerate the road company from the penalties imposed by the original act, it being manifest that the legislature did not intend to relieve it from liability. Nor does an act permitting a turnpike road company to abandon a part of its road, discharge the company from a penalty incurred in reference to the abandoned part previous to the act.¹

When corporations are not included in the terms of a statute, they are not liable to the penalty imposed by it on the owner, agent, or superintendent of any manufacturing establishment for employing knowingly children under the age of twelve years in laboring more than ten hours a day in such establishment. As the offence consists in *knowingly* employing, etc., contrary to the provisions of the act, such knowledge could not in ordinary cases be brought home to the corporation as such, though it might be shown with reference to the agent or superintendent.²

A telegraph company, for the purpose of liability, is as much the agent of him who receives, as of him who sends the message; and even if a telegraph company were considered only as the agent of the sender of the message, the company would be liable to third persons as a wrong-doer for any misfeasance in the execution of the duties confided to it, the same as an individual.³

A corporate body cannot commit a felony by any posi-

ploy the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants by authority of the corporation express or implied. Thus it is liable in trover or in case for indirect injuries resulting from tortious acts, in trespass *quare clausum fregit*, or tres-

pass *vi et armis* to personal property, and in ejectment. So a corporation may be guilty of a *disseizin*, or even of an assault and false imprisonment."¹

¹ Kane v. People, 8 Wend. 203.

² Brunson v. Monson, etc., Manf. Co., 9 Metc. 562.

³ N. Y., etc., Tel. Co. v. Dryburg, 35 Pa. St. 298.

tive or affirmative act, or, as a corporation, incite others to do so. If it were otherwise, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Hence when a crime is committed under color of corporate authority, the individuals engaged in the transaction, and not the corporation, should be indicted.¹

§ 281. Libel.—It is now well settled that a corporation aggregate may compose and publish a libel and become amenable to an action for damages by the person of and concerning whom the words were composed and published. The argument against the possible existence of a cause of action of this kind is: first, that the corporation is a mere legal entity incapable of malice, which is an essential element of libel; and second, that a libel composed and published by the representative agents of a corporation is an act *ultra vires*, and, therefore, cannot become a cause of action against the corporation. But the directors are deemed to be the mind and soul of the corporate entity, and what they may do as the representatives of the corporation, the corporation itself must be deemed to do, and the motives and intentions of the directors are to be imputed to the corporation itself. Where, therefore, they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong and answerable for it as an individual would be in such case.² In

¹ See State v. Gt. Works Milling, etc., Co., 20 Me. 41; State v. Ohio & Miss. R.R. Co., 23 Ind. 362. "There are crimes (perjury, for example), of which a corporation in the nature of things cannot be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient." GREEN,

C. J., in State v. Morris & Essex R.R. Co., *supra*. See Cumberland, etc., Canal Corp. v. Portland, 56 Me. 77; Androscoggin Water Power Co. v. Bethel, etc., Mill Co., 64 Id. 441.

² Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; Vinas v. Merchants' Mu. Ins. Co., 27 La. Ann. 367; Southern Express Co. v. Fitzner, 59 Miss. 581; Payne v. Western, etc., R.R. Co., 13 Lea Tenn. 507.

England, in an action against a railroad company for a libel transmitted by telegraph, Lord CAMPBELL, in delivering the judgment of the court, said: "The demurrer to the declaration in this case can only be supported on the ground that the action will not lie without proof of express malice as contradistinguished from legal malice. But if we yield to the authorities which say that in an action for defamation malice must be alleged (notwithstanding authorities to the contrary), this allegation may be proved by showing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs and did not mean to injure them. Therefore, the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."¹

It was said in a late case in New Jersey that "Not only does common sense scout the proposition that while a natural person is liable to damages for libel, an artificial person composed of several natural persons is not, but has legal license and immunity to libel as and whom it will, but it is a familiar principle that a corporation is liable for the tortious acts of its servants."² In Minnesota, in an action for libel, the court said: "Theoretically, a corporation is perhaps incapable of passion. I say 'perhaps,' because upon

¹ Whitfield v. Southeastern R.R. Co., S. C. 43 N. J. 488. See Johnson v. St. Ell. Bl. & Ell. 115. Louis Despatch Co., 2 Mo. App. 565; Van Aernam v. McCune, 32 Hun,

² Evening Journal Assoc. v. McDermott, 44 N. J. 430; 43 Am. R. 392; 316.

an analysis of the construction and practical operation of these bodies, the theory becomes invested with considerable doubt. That they should possess that attribute in law in order to harmonize their obligations and liabilities with those of individuals prosecuting the same enterprises, there is not only no doubt, but an imperative necessity. . . . In everything they do, although exercising themselves through agents and officers, they act with as much design and intelligence as an individual. Take, for example, the case of a corporation established for the publication of a newspaper. The members of this body become hostile to a citizen and determine to injure him. They assemble in their corporate capacity and resolve to circulate an infamous libel concerning him. One member pens it and the rest approve. The ensuing morning it is read by thousands, and a citizen, who was the day before above suspicion, stands before the community branded with crime and infamy. The position that this corporation, being a purely intellectual and ideal existence, is incapable of malice, because malice is an emotion of the heart, a passion, is too refined a fiction for tolerance in the practical affairs of life at the present day."¹ In Phila., etc., R.R. Co. v. Quigley,² which was an action against a corporation for libel, CAMPBELL, J., in delivering the opinion of the court, said : "The defendants contend that they are not liable to be sued in this action ; that theirs is a railroad corporation with defined and limited faculties and powers and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel ; that this action should have been instituted against the natural persons who were concerned in

¹ Aldrich v. Press Printing Co., 9 New Orleans Printing, etc., Co., 29 La. Minn. 133. See Hewitt v. Pioneer Ann. 134.
Press Co., 23 Minn. 178; Hawkins v. ² 21 How. 202.

the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and, therefore, that no crime or offence can be imputed to it. That, although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts not being contemplated by the charter must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence; to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the Union relative to these artificial persons. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain as well as in the United States that actions might be maintained against corporations for torts, and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents of nearly every variety."

A newspaper, among other items of intelligence, contained the following: "We would observe to those interested that we see no reason why the Shoe & Leather Bank may not at any time be closed up by an injunction. After promising to quote the Merchants' Bank at Trenton, I was informed that legal proceedings against the Shoe & Leather Bank were already under advisement." It was held that as these words were calculated to impair the credit and affect

the standing of the bank, they were actionable *per se* without the necessity of proving special damage, the same as if spoken or written of an individual.¹ In an action for libel, evidence that the defendant had, before publishing the charge, seen it published in different newspapers, is competent in mitigation of damages.² Where, when a libellous publication was discovered by the editor of a paper, he caused it to be omitted from the subsequent editions, voluntarily made a retraction in the next day's issue, and there was no proof of prejudice against the plaintiff, or of any intention to wound his feelings or injure his good name or reputation, but it was a hasty, inconsiderate, and improper publication, false and defamatory in its details, which the editor at once appreciated and sought to remedy, it was held that the refusal of the judge to instruct the jury that the defendant was not liable for actual malice, was erroneous, and that there must be a new trial.³ This decision was, however, afterward reversed on the ground that the falsity of the libel was sufficient evidence of malice; and such malice was imputable to the corporation because the publication was in law its own act, performed by its servants in the business it was created to carry on, and not by any wilful departure from such business for the private and individual purposes of the servants.⁴ In Detroit Daily

¹ Shoe & Leather Bank v. Thompson, 23 How. Pr. 253; 18 Abb. Pr. 413. See Knickerbocker Life Ins. Co. v. Ecclesine, 34 N. Y. Supr. Ct. 76; 42 How. Pr. 201; Brennan v. Tracy, 2 Mo. App. 540; Metropolitan Saloon, etc., Co. v. Hawkins, 4 Hurl. & Norm. 87. To charge the trustees of a manufacturing company with the penalty imposed by the statute of New York of 1848, ch. 40, sec. 15, for signing a false report knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, wilfully, or for some fraudulent purpose, and not ignorantly or inadvertently; and this

is a question of fact which must be passed upon before the liability can be adjudged. The penalty follows an actual, and not a constructive falsehood,—one known and understood to be such, and not possibly believed to be otherwise. Bonnell v. Griswold, 89 N. Y. 122; Pier v. Hanmore, 86 Id. 95; Swinger v. Raymond, 83 Id. 192; 38 Am. R. 415.

² Hewitt v. Pioneer Press Co., 23 Minn. 178.

³ Samuels v. Evening Mail Assoc., 9 Hun, 288, DAVIS, P. J., dissenting.

⁴ 75 N. Y. 604.

Post Co. v. McArthur,¹ CAMPBELL, J., in delivering the opinion of the court, said that "The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would properly exclude improper items, would reduce the blameworthiness of a publisher to a minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling beyond what is inevitable from the nature of the libel. And no amount of express malice in his employés should aggravate damages against him, when he has thus purged himself from active blame. If, on the other hand, it should appear from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because by his own fault he had deserved them. By such recklessness he encourages fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct."

Previous or subsequent publications are admissible in evidence for the purpose of showing the animus of the publication complained of, and it therefore makes no difference that the previous publication is one on which, by reason of the bar of the statute of limitations, no action can be maintained; but if the previous or subsequent publication be privileged, it will be no proof of malice, and consequently be entitled to no weight.²

¹ 16 Mich. 447.

² Evening Journal Assoc. v. McDermott, 44 N. J. 430; 43 Am. R. 392; S. C. 43 N. J. 488. In Barrett v. Long, 3 House of Lords Cas. 395, in an action for libel in which there was a plea under the statute of 6 and 7 Vict., ch. 96, denying actual malice, and stating the

publication of an apology set forth in the plea, it was held that the plaintiff might prove other libels by the defendant concerning the plaintiff, some of them more than six years before the publication complained of, in order to show malice. The court said: "We are all of opinion that under such a

§ 282. Malicious prosecution.—Where the officers of a corporation acting by its authority institute criminal proceedings, it is subject to the same liabilities and responsibilities as would be incurred by an individual who commenced and carried on such a prosecution; and if instituted without probable cause and maliciously, it will subject itself to an action for malicious prosecution.¹ In *Goodspeed v. East*

plea, the publication of previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight and not the admissibility of the evidence."

¹ *Copley v. Grover & Baker Sewing Machine Co.*, 2 Woods, 494; *Ricord v. Cent. Pacific R.R. Co.*, 15 Nevada, 167; *Vance v. Erie R.R. Co.*, 32 N. J. (3 Vroom) 334; *Fenton v. Wilson Sewing Machine Co.*, 9 Phila. 189; *Reed v. Home Savings Bank*, 130 Mass. 443; *Stewart v. Sonneborn*, 98 U. S. 187; *Ripley v. McBarron*, 125 Mass. 272; *Stone v. Crocker*, 24 Pick. 81; *Iron Mt. Bank v. Mercantile Bank*, 4 Mo. App. 505; *Morton v. Metrop. Life Ins. Co.*, 34 Hun, 366; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Carter v. Howe Machine Co.*, 51 Md. 290; 34 Am. R. 311; *Wheless v. Second Nat. Bank*, 1 Baxter Tenn. 469; *Jeffersonville R.R. Co. v. Rogers*, 28 Ind. 7; *Mitchell v.*

Jenkins, 5 B. & Ad. 588; s. c. 2 Nev. & Man. 301; *Walker v. Southeastern R.R. Co.*, L. R. 5, C. P. 640. It was stated by the Supreme Court of Alabama that if the distinction between acts injurious in their effects and for which the actor is liable without regard to the motive which prompted them, and conduct the character of which depends upon the motive, and which apart from such motive cannot be made the ground of legal responsibility, is well taken, it would follow that if a corporation as such is incapable of malice, it is not liable to be sued for a malicious prosecution. *Owsley v. Montgomery & West Point R.R. Co.*, 37 Ala. 560. But the court in a subsequent case said that the same reasons that render a corporation responsible for any tort committed by its agents, if we do not resort to the technicality that it is incapable of motive, will render it liable for a malicious prosecution. *Jordan v. Ala. Gt. Southern R.R. Co.*, 74 Ala. 85. It was held not very long since in Missouri, that a railroad corporation was not liable for a malicious prosecution instituted by its agents against an individual for a crime committed against the laws of the State, without showing that power was given to the corporation to engage in such prosecutions, or that it came within the scope of its general powers or purposes. "It is stated in the petition," said the court, "that the corporation caused the plaintiff to be arrested, and

Haddam Bank,¹ it was held that an action on the case for malicious prosecution might be maintained against a corporation. The defendant claimed that the remedy for the injury should be sought against the directors, or the individu-

that it was within the scope of the power of the agents. But it must be recollect that the stockholders of a corporation only constitute their directors and other officers their agents in their corporate capacity to bind them in such matters as come within the objects of their incorporation, and within the powers granted by their charter. When they act wholly outside of these objects and powers the corporation is not bound. It is certainly not within any usual objects or powers of a railroad company to prosecute criminally offenders against the criminal laws of the State, and it is not pretended that any such power was ever specially conferred on the defendant in this case." ADAMS, J., dissenting, said: "It must be conceded that railroad companies are created and carried on mainly for the profits in money to be derived from them. They have the undoubted right to protect themselves in the enjoyment of their moneys and property. That they may maintain civil actions for the robbery of their treasury, or for the destruction of their property by incendiaries or others, there can be no dispute. But where such robbers and incendiaries are wholly insolvent, have they no authority to resort to the criminal laws for the protection of their property? May they not cause such persons as threaten to destroy their property to be arrested and compelled to give security for their good behavior? It would seem to be manifestly just, and within the scope of their corporate power, to allow them to use all means known to the laws to protect themselves from threatened danger. If they can thus protect

themselves in advance, why cannot they use their own means to bring criminals to justice who have robbed them or burned up or destroyed their property? Must an outlaw be suffered to go free who has burned their depots, cars, and bridges, simply because he is insolvent, and a civil action would be unavailing? In my opinion it is not only within the scope of their authority, but it would be their imperative duty to use their means in the prosecution of such offenders. If that be conceded, and they should be guilty of instituting through the malice of their officials a wholly groundless prosecution, they ought to be liable to the party injured in an action for such malicious prosecution." In the foregoing case it was alleged that the chief secretary and treasurer of the corporation maliciously caused the plaintiff, who was a clerk in charge of the funds of the corporation, to be arrested and imprisoned for embezzlement. *Gillett v. Missouri Valley R.R. Co.*, 55 Mo. 315, overruled in *Boogher v. Life Assoc.*, 75 Id. 319; 42 Am. R. 413. A clerk in the service of a railroad company whose duty it is to issue tickets to passengers and receive the money and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till after the attempt has ceased; such arrest not being necessary for the protection of the company's property. The company is not, therefore, liable for such act of the clerk. *Allen v. London & South Western R.R. Co.*, L. R. 6, Q. B. 65.

¹ 22 Conn. 530.

als, whoever they were, by whose agency the malicious action was brought, and not against the corporation ; that a corporation, from its very nature, could not entertain malice, and no presumption could arise from the relation of the directors to the corporation that the action was authorized by it. The court said : "The objection to the remedy of the plaintiff against the bank in its corporate capacity is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days ; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that corporations cannot have motives and act from motives, is to deny the evidence of ourselves, when we see them thus acting and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one ; they can intend to do evil as well as good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank in the usual modes of its action, and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application."¹

In *Edwards v. Midland R.R. Co.*,² the plaintiff had been arrested by a detective in the employment of a railroad

¹ ELLSWORTH and HINMAN, JJ., Baker Sewing Machine Co., 2 Woods, dissenting. See *Copley v. Grover & 494.*

² 6 Q. B. Div. 287.

company, on a charge of theft, which charge had been dismissed; and the question arose whether an action for malicious prosecution could be maintained against a corporation. The court, in holding the affirmative, said: "The malice, in order to found such an action, need not be express malice, but it may be implied from the wrongful action without just cause or excuse. Now, it is a maxim that a corporation has no mind, no *mens rea*, therefore they cannot be guilty of malice; can they, therefore, escape the consequences of an action which, in the case of an ordinary person, would be held to imply malice? Mr. Hill suggests to me the case of partners who would be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company; can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable."¹

¹ The court, in continuation of its remarks, said that "those who deny that the company can be made liable, rely principally on Baron ALDERSON's judgment in Stevens v. Midland Counties R.R. Co., 10 Ex. 352, where he held that in order to support such an action, it must be shown that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons PLATT and MARTIN, did not agree with Baron ALDERSON's reasons, but decided in the company's favor on other grounds. Has Baron ALDERSON's opinion, which in that case stands alone, been followed by other judges? In Rex v. City of London, which is cited in a note to Whitfield v. Southeastern R.R. Co., E. B. & E. 122, it was held on demurrer that an action would lie against the

corporation of the city of London for maliciously publishing a libel, and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice SAUNDERS, an able and experienced judge. In Yarborough v. Bank of England, 16 East. 6, Lord ELLENBOROUGH referred to an earlier case of Argent v. Dean and Chapter of St. Paul, 16 East. 7, note a., and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again, in Whitfield v. Southeastern R.R. Co., E. B. & E. 121, Lord CAMPBELL says that 'the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails,

§ 283. Misrepresentations of agent.—Misrepresentations made by the agents of a corporation which form a foundation for a contract between the corporation and a third person, will entitle the latter to avoid the contract, and the corporation must take upon itself the consequences of the misrepresentations.¹ The principal is liable for the false representations of the agent made in and about the matter for which he was appointed agent, not on the ground of express authority given to the agent to make the statement, but on the ground that, as to the particular matter for which the agent is appointed, he stands in the place of the principal, and whatever he does or says in and about that matter, is the act and declaration of the principal.²

and considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation.' In

Green v. London Genl. Omnibus Co., 7 C. B. N. S. 290, 301, it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice ERLE says: 'The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the defendants being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie.' In the case before me it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice ERLE continues: 'The doctrine relied on that

a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial.' In other words, the *ratio decidendi* of Baron ALDERSON was in this case disregarded, and as his decision has not been followed in English courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case."

¹ Henderson v. Lacon, L. R. 5, Eq. 249; Johnston v. S. W. R.R. Bank, 3 Strobb. Eq. 263; Tome v. Parkersburg Branch R.R. Co., 39 Md. 36; People's Bank v. Kurtz, 99 Pa. St. 344; Moores v. Nat. Bank of Piqua, 111 U. S. 156; Lamm v. Port Deposit Homestead Assoc., 49 Md. 233; Bank of Greensboro v. Clapp, 76 N. C. 482; Waldo v. Chicago R.R. Co., 14 Wis. 575; First Nat. Bank v. Hurford, 29 Iowa, 579. See Wright's Appeal, 99 Pa. St. 425; Mt. Holly Paper Co.'s Appeal, Ib. 513; West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557; S. C. 3 Dillon, 403; Custar v. Titusville Gas & Water Co., 63 Pa. St. 381.

² Sharp v. Mayor, etc., of N. Y., 40 Barb. 256; Nicol's Case, 3 De Gex &

At common law, the incidents attaching to the appointment of an agent are not more restricted when it is made by a corporation, than when the appointment is made by an individual. Where a corporation has power to do some act, and, as incident to that act, to render itself liable for representations made in and about the doing of it, it can appoint an agent to do the act; and from the mere fact of such appointment, the same powers will flow to the agent as if he had been appointed by an individual, provided the powers so flowing could have been exercised by the corporation. All deceit, misrepresentation, falsehood, fraud in the course of business, by which a person is cheated by the agent, is the act of the corporation, and it may be held liable therefor in damages.¹ Where an agent, engaged for the purpose of obtaining subscriptions to a project for organizing a joint stock company in relation to real estate, misrepresents the location and quality of the land, and thereby induces parties to enter into contracts of purchase, the principal is responsible.² A railroad company which seeks the fruits of oppressive and improper acts on the part of its president and manager, is affected through him with the vice of his conduct.³

A defense to a contract on the ground that it was obtained through fraud, is not the same with that which sets

J. 385; Covington v. Covington, 10 Bush. 69. When a person is appointed by the president and secretary of an insurance company, to make contracts of insurance in behalf of the company, it is within the scope of his authority to answer inquiries concerning the condition and property of the corporation, and its ability to fulfil its contracts with those who are about to accept policies, and the company is bound by his representations. Fogg v. Griffin, 2 Allen, 1.

¹ Scofield Rolling Mill Co. v. State, 54 Ga. 635; Peebles v. Patapsco Guano

Co., 77 N. C. 233. Persons dealing with corporations must take notice of whatever is contained in the law of their organization, and must be presumed to be informed as to the restrictions or conditions annexed to the grant of power by the law by which the corporation is authorized to act. Silliman v. Fredericksburg, etc., R.R. Co., 27 Gratt. 119; Pearce v. Madison & Ind. R.R. Co., 2 How. 441; Zabriskie v. Cleveland R.R. Co., 23 Id. 381.

² Sandford v. Handy, 23 Wend. 260.

³ Union Pacific R.R. Co. v. Durant, 3 Dillon, 343.

up that the contract was rescinded. "The former admits the existence of the contract, but seeks to avoid it in whole or in part by proof of facts to which the law gives efficacy, according to their legal effect on the rights of the parties. But it does not necessarily defeat the action, or prevent a party who relies on the contract from maintaining his action and recovering such damages as he may prove he has sustained. But it is otherwise where the defense rests on a rescission of the contract. In such case the issue is that the contract has ceased to have any legal existence, not by reason of fraud or falsity in its inception only, but by reason of such fraud and falsity in connection with other and distinct acts *in pais* by which it has been terminated. If this defense is established, the action on the contract cannot be maintained."¹

§ 284. Nuisance.—An action may be maintained against a private corporation for damages resulting from an alleged nuisance, caused by the erection of the buildings and operating the works of the corporation, whereby the atmosphere is impregnated with deleterious and offensive odors, and the water with unpalatable tastes, notwithstanding the works are lawful and useful, erected on land purchased of plaintiff, he knowing the purpose for which it was acquired, and licensed by the public authorities.² A railroad company which permits a horse killed by its locomotive to remain on the side of the track so near a dwelling-house as to render its occupancy unwholesome, is guilty of a nuisance, for which the company is liable to an action by the person in the possession of the house for damages.³ An action may be maintained against a railroad company to recover damages for the disturbance of the plaintiff's enjoyment of

¹ Fogg v. Griffin, *supra*, per BIGELOW, C. J.

² Terre Haute Gas Co. v. Teel, 20 Ind. 131.

³ Ellis v. Kansas, etc., R.R. Co., 63 Mo. 131.

premises owned and occupied by him, caused by the negligent, careless, and improper manner in which the company keep a cattle-pen near plaintiff's premises, by which noxious and poisonous smells and stenches are generated to plaintiff's great discomfort and inconvenience, rendering his premises unwholesome and uninhabitable; but not for annoyances caused by the shouting and noises made by men in charge of stock placed in the pen, who are not agents of the company, or in a position to be controlled by it. If the damages recovered are for the deterioration in the value of the plaintiff's property, such recovery will be a bar to any further prosecution for the same cause. But if they are for annoyance merely, and for rendering the air unwholesome, a similar recovery may be had at every term of the court during the continuance of the nuisance.¹ In an action on the case for a nuisance, by a religious society against a railroad company, the complaint alleged that the defendant, by ringing its bells, blowing off steam, and other noises in the neighborhood of the plaintiffs' meeting-house on Sunday during the period of public worship, so annoyed and molested the congregation worshipping there, as greatly to depreciate the value of the house, and to render the same an entirely unfit place for religious worship. It was held that the plaintiffs were entitled to recover.² Where a railroad company, for the purpose of constructing its works, erected a mill for grinding mortar on its land, within a few feet of the plaintiff's place of business, who complained of the injury and annoyance occasioned by the noise and vibration, an injunction was granted, the mortar-mill not being indispensable to the construction of the line.³

An incorporated canal company may be indicted for

¹ Ill. Cent. R.R. Co. v. Grabill, 50 Ill. 241. ² Fenwick v. East London R.R. Co., L. R. 20, Eq. 544. See Cent. Bridge

³ First Baptist Church v. Schenectady & Troy R.R. Co., 5 Barb. 79.

Co. v. Lowell, 4 Gray, 474.

maintaining the tow-path in so careless, unskilful, and unlawful a manner that the water from the canal escapes through the lock or walls, and forms pools or ponds of stagnant water producing miasma or miasmatic vapors, corrupting and rendering the air unwholesome, to the nuisance and injury of the public, and producing disease among the inhabitants of the neighborhood.¹

In Massachusetts, upon the indictment of a corporation for a nuisance in erecting and maintaining a bridge across a navigable river, and thereby obstructing the navigation, the Supreme Court, in replying to the argument on the part of the defense that the indictment could not be maintained, said: "There are *dicta* in some of the early cases which sanction the broad doctrine, and it has been thence copied into text writers, and adopted in its full extent in a few modern decisions. But if it ever had any foundation, it had its origin at a time when corporations were few in

¹ Delaware Division Canal Co. v. Com., 60 Pa. St. 367. See State v. Ohio & Miss. R.R. Co., 23 Ind. 363. In Maine a corporation was indicted for a nuisance in the erection of a dam across the Penobscot River, which obstructed the use of the river as a public highway for the purposes of navigation. A verdict of guilty having been rendered, the Supreme Court, on appeal, said: "A corporation is created by law for certain beneficial purposes. It can neither commit a crime or misdemeanor, or incite others to do so, as a corporation. While assembled at a corporate meeting a majority may, by a vote entered upon their records, require an agent to commit a battery; but if he does so, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offence thus incited by them, the innocent dissenting minority

becomes equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted as individuals, either as principals or aiding and abetting, or procuring an offence to be committed, according to its character or magnitude. It is a doctrine then in conformity to the demands of justice, and a proper distinction between the innocent and guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted. . . . The corporation here attempted to be charged, has violated no duty imposed upon it by statute. Whatever has been done was by the hand or procurement of individuals. They may be indicted and punished and the nuisance abated." State v. Gt. Works Milling & Manf. Co., 20 Me. 41. See Cumberland v. Portland, 56 Id. 77.

number, and limited in their powers and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them as far as possible in their legal duties and responsibilities to individuals. To a certain extent the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist of a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; perjury, or offences against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would in many cases preclude all adequate remedy, and render reparation for an injury committed by a corporation impossible; because it would leave the only means of redress to be sought against irresponsible servants instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offences."¹

¹ Com. v. Proprs. of New Bedford Counties R.R. v. Broom, 6 Exch. 314; Bridge, 2 Gray, 339. See Maund v. State v. Morris & Essex R.R. Co., 23 Monmouthshire Canal, 4 Man. & Gr. N. J. (3 Zab.) 360. In the latter case, 452; 5 Scott N. R. 457; Reg. v. Gt. GREEN, Ch. J., remarked of the anonymous North. of Eng. R.R., 9 Id. 315; Eastern case reported in 12 Mod. 559, in

If the charter of a corporation authorizes it to build a dam on its own land upon a river which is a highway, it is protected from an indictment for a nuisance in obstructing the river; but if the corporation in doing this overflows a party's land, it is liable to an action therefor.¹ On the in-

which it is reported that Chief Justice HOLT decided that a corporation was not indictable, but that the particular members of it were; that it might well be doubted whether this was not one of those cases which extorted from Lord HOLT the bitter complaint of his reporters, that the stuff which they published would make posterity think ill of his understanding and that of his brethren on the bench; that aside from the apocryphal character of the report, it was hardly credible that so learned and accurate a judge as Lord HOLT should have laid down the broad proposition imputed to him by the reporter; for it was certain that while he was Chief Justice of the King's Bench there were cases before that court of indictments against *quasi* corporations for neglect to repair roads and bridges. In *Rex v. Mayor of Liverpool*, 3 East. 86, a corporation having been indicted by its corporate name for the non-repair of a highway, though the indictment was held defective, no objection was made as to the liability of a corporation to be indicted. In *Rex v. Mayor, etc., of Stratford-on-Avon*, 14 East. 348, the corporation being indicted by its corporate name for the non-repair of a bridge, and found guilty, the verdict was sustained, and no question raised as to the general liability of a corporation to an indictment for a breach of duty cast upon it by law. In *Reg. v. Birmingham & Gloucester R.R. Co.*, 3 Ad. & E. N. S. 223, where the company was indicted for disobedience to an order of justices to construct certain arches to connect land which had been severed by the

railroad, the counsel of the company relied chiefly upon the circumstance that the indictment was found at the Quarter Sessions, where the company could not appear and take its trial even if so disposed, as a corporation could only appear by attorney, and its appearance at the Sessions must be in person. It was held, however, that there was no weight in this objection that although it might impose some difficulty upon the prosecutor and render his proceeding more circuitous, as he would be obliged to remove the indictment by certiorari, yet the liability of the corporation was not affected. Neglect to keep in repair highways is a violation of a public duty, and is punishable by indictment at common law. Generally the obligation to make as well as to repair the roads belongs to the county or town. In England it sometimes rests upon individuals by reason of tenure, or prescription, or act of Parliament. In the latter case such individuals are indictable for failure to discharge the public duty. *Woolrych on Ways*, Ch. 9; 2 Williams Saunders, 158. See *Com. v. Trustees*, 7 B. Mon. 38; *Bragg v. City of Bangor*, 51 Me. 532; *State v. Dover*, 46 N. H. 452. In New York, the provisions of the act for notice to the directors of a plank road company, and a penalty for not repairing, were held not to supersede the common law remedy by indictment. *Turnp. R. Co. v. People*, 15 Wend. 267; *Waterford, etc., Turnp. R. Co. v. People*, 9 Barb. 161; *Syracuse & Tully Plank R. Co. v. People*, 66 Id. 25.

¹ *Hooksett v. Amoskeag Manf. Co.*, 44 N. H. 105; *Eastman v. same*,

dictment of a gas company for obstructing a public highway, it was admitted by the defendant that it had no statutory power to create obstructions or lay down pipes for private supply. The question was confined to the acts of the company in laying down bricks and earth and digging trenches, in one instance across the street, and in another across the sidewalk of the street, for the purpose of extending service pipes to private houses, from the mains. These service pipes had been laid down by the company at the request and under the direction of the owners of houses carefully and without creating any unnecessary nuisance. It was not disputed that the highway was obstructed so as to create an indictable nuisance, unless the company was justified in committing the acts complained of in the exercise of the right of each householder to make such slight temporary obstructions on a highway or footway as might be necessarily incidental to the enjoyment of his property ; such, for example, as the obstruction caused in using common coal-holes in the pavements, the unloading of carts, the putting up boards for repairing, and other similar temporary obstructions. It was held that the case did not fall within any of the exceptions to the general law as to the obstruction of highways.¹

Railroad companies are liable to indictment for obstruct-

Ibid. 143. A charter of a plank road and ferry company which authorizes the company to drive piles and erect certain works in a navigable stream necessary for its road and ferry, and provides that the free and uninterrupted navigation of vessels in the river shall not thereby be prevented in any manner whatever by the company, is to be construed strictly. Where a decree of court enjoined the company from constructing its works on the river in a manner set forth, but left the mode of construction to the judgment of the

company, it was held that if the company erred in carrying out the instructions of the court, it was not liable to an attachment for contempt, but that if the works were found to be a nuisance they would be abated. Newark Plank Road, etc., Co. v. Elmer, 1 Stockt. 754.

¹ Reg. v. Longton Gas Co., 2 Ell. & Ell. 651; 105 Eng. Com. L. 651. See Reg. v. Gt. North. of Eng. R.R. Co., 58 Com. L. 314; Del. Canal Co. v. Com., 60 Pa. St. 367; State v. Vt. Cent. R.R. Co., 27 Vt. 103.

ing a highway. In making its road across a public highway, it must be done, if possible, without any inconvenience to the public. If a bridge or substituted road is necessary, it must be made in a reasonable time, and cannot be delayed until the railroad is completed.¹ A legislative grant authorizing a railroad company to enter upon, take, and appropriate to its own use, on making just compensation therefor, such land as it may require for the use of its railroad, and to cross all intervening waters and streams, exempts the company from liability, as respects the public, to indictment for a nuisance, or otherwise; but it leaves rights of property unaffected.

In an action against a railroad company for damages caused the plaintiff in the construction of its road across his land, the following instruction of the court was held proper: That if the jury found from the evidence that the plaintiff gave the company the right of way, or permission to build its road over his land at a certain place, such right of way would not authorize the company to build its road anywhere else over his land; but if the company built the road elsewhere with the knowledge of the plaintiff, and without any objection from him, the plaintiff stating to the agents of the company that he would make it pay for the land, the company would not be a wrong-doer, but would have the right to construct its road-bed in the usual manner by throwing up and raising the ground, and cutting ditches along the side to keep the water from the track; that if they found that the company made its road-bed and ditches with reasonable skill, and the plaintiff was thereby incidentally injured by the flow of surface water on his

¹ Louisville & Nashville R.R. Co. v. State, 3 Head. Tenn. 523; Com. v. Vt., etc., R.R. Co., 4 Gray, 22. At common law, when a nuisance was an obstruction to the use of a highway, or was dangerous to life or health, it was a

part of the judgment that it be abated at the expense of the wrong-doer. The court might defer sentence in order to afford an opportunity to remove the obstruction, and if this was done, impose a nominal fine.

land, he could not recover therefor; but that if, in the construction of the road-bed and ditch, the company diverted the water of a stream or watercourse from its usual channel, and caused it to flow on the plaintiff's land, thereby rendering it less useful for cultivation, the verdict should be for the plaintiff.¹

§ 285. Injury from improper interference with highway or street.—A railroad company, under the provisions of a general act or charter which does not change or affect rights of property, must cross, intersect, or run along streams and highways, or other roads, at its peril. If it alters or affects the stream or road, it must restore it to its former condition, so that the rights of third persons be in no way affected injuriously by such change, or it will be responsible in damages for the injury sustained from such omission.² A mill stood on a narrow strip of land, between a river on one side and a high bluff or hill on the other. A township road started at the mill, and, after running along the narrow strip for some fifteen or twenty rods, left the valley and passed into the open country. Side by side with this township road was a railroad, elevated a few feet above it, and passing the mill at a distance of about thirty feet from its door. There was no room for another road between the township road and the river, and along this road teams and horses must pass to and from the mill; a precipitous bank and the river being on one side, and the railroad on the other. In the opinion of the witnesses, this presented a case of such peril and inconvenience in frightening teams and horses, as to compel them and others to carry their grain to be ground to other mills. It was held that if

¹ *Hosher v. Kansas City, etc., R.R.*, 60 Mo. 329. See *McCormick v. same*, 57 Mo. 433; *Imler v. Springfield*, 55 Id. 119; *Jones v. Hannovan*, Ib. 462; *Munkers v. Kansas City, etc., R.R. Co.*, 60 Id. 33.

² *Robinson v. N. Y. & Erie R.R. Co.*, 27 Barb. 512; *Chicago, Rock Island & Pacific R.R. Co. v. Moffitt*, 75 Ill. 524; *Miss. Cent. R.R. Co. v. Mason*, 51 Miss. 234; *Fletcher v. Auburn, etc., R.R. Co.*, 25 Wend. 462.

this state of things resulted as an immediate and direct consequence of the taking of the plaintiff's property on which to build the railroad, and if the fear and danger were reasonable, and prevented people from going to the mill, the depreciation in the value of the property was a ground for maintaining an action against the company for damages.¹

A town in its corporate capacity has such an interest in the preservation and protection of the privileges of the town as renders it proper for it to apply to a court of equity to prevent and restrain a railroad company from laying a railroad longitudinally on and along an existing highway; and the court will appoint commissioners to examine and report whether, under the grant to the company, it was, by fair and reasonable intendment, necessary to construct its road in the place and manner complained of.²

The owners of lots on a street take their title subject to the appropriation of the street to such public uses promotive of commerce and business as the general good of the city or town may require. This public right is limited only to the extent that the appropriation must not be incompatible with the ends for which the street was established.

¹ Western Pa. R.R. Co. v. Hill, 56 Pa. St. 460. A railroad company was empowered to make its road from some point within a city to be approved by the common council. Also to place on the railroad "machines, wagons, vehicles, carriages, and teams of any description whatever which the company might deem proper for purposes of transportation." The common council authorized the prosecution of the work within the limits of the city, provided the city should not be considered as thereby parting with any power or chartered privilege not necessary to the company for constructing its railroad and connecting the same with the depot

of the company in the city. The common council subsequently passed an ordinance which declared that no vehicle should be propelled by steam on a specified part of the track of the railroad within the corporate limits, under a penalty named. It was held that the ordinance, by merely preventing the employment of locomotives on the streets, did not impair the obligation of any contract, nor violate any essential franchise of the railroad company, and that it was therefore valid. Richmond, etc., R.R. Co. v. Richmond, 26 Gratt. 83.

² Springfield v. Connecticut River R.R. Co., 4 Cush. 63.

It must not deprive the persons living on it of its reasonable use as a passway. The right to such a use is an incorporeal hereditament legally attached to the contiguous ground of which the owners cannot be deprived without compensation.¹ If a private corporation is authorized to construct its works in a street, and injury accrues to private property in the exercise of the power, the corporation will be liable to indemnify the sufferer therefor, though due care be exercised, and the injury is the natural or inevitable result of the making of the improvement.² In adjusting the grade of a railroad, the company made an embankment about six feet high across a street, and this necessitated a corresponding elevation in the grade of the street opposite the lot of the plaintiff. At the instance of the municipality, and for the convenience of the citizens, the embankment was extended by the company. Previous to the extension, the lot of the plaintiff was higher than the level of the street, and the elevation of the track of the railroad with its culvert would not have obstructed the flow of water from the lot to a sink near the depot below and across the street; but the extended embankment occasionally obstructed the flow so much, as, by stagnation or reflux, to flood a portion of the lot, and not only injure its grass, but annoy the occupants and subject them to inconvenience. In an action against the company by the owner of the lot, it was held that he was entitled to a verdict for damages.³ Although

¹ Lexington & Ohio R.R. Co. v. Applegate, 8 Dana, 289; Cosby v. Owensboro, etc., R.R. Co., 10 Bush. 288.

² Balt. & Potomac R.R. Co. v. Reany, 42 Md. 117; Story v. N. Y. Elevated R.R. Co., 90 N. Y. 122; Ford v. Santa Cruz R.R. Co., 59 Cal. 290; Hopkins v. Western Pacific R.R. Co., 50 Id. 190.

³ Louisville & Nashville R.R. Co. v. Hodge, 6 Bush. 141. Where a private corporation built and kept in repair a passage-way which, by general uninter-

rupted use, had become a public road, it was held that the company was liable for injuries occasioned a traveler by the upsetting of his wagon from obstructions. Taylor v. Boston Water Power Co., 12 Gray, 415. When the property of an individual is rendered less valuable in consequence of the adjoining street being elevated above or depressed below the common level under the authority of a municipal corporation, it is *damnum absque injuria*, a contingency

the owner of property in a city is entitled to damages against a railroad company for any obstruction to the street by earth, timber, or rails substantially affecting the use of the street by the owner of the property as an appurtenance to his premises, yet in respect to noise, smoke, or other discomforts arising from the use of the railroad by the company, he has no more right to recover than any person residing on, or having occasion to pass so near the street, as to be subjected to like discomforts; a railroad authorized by law, and lawfully operated, not being deemed a private nuisance.¹ A railroad company, with the consent of borough authorities, constructed its road through the centre of a public street in the borough. At that time the plaintiff had erected and nearly completed at large cost a handsome dwelling-house on his lot fronting on the street. It was held that the action which was brought against the company to recover damages for the inconvenience and annoyance occasioned by the building and operating of the railroad immediately in front of his residence by the passage of trains, by the cinders and smoke, and by the hindrance to carriages, could not be maintained, although the company might have located its road upon another route shorter and of easier curvature.²

to which his property is necessarily subject, and for which the corporation is not responsible unless the injury has been inflicted either wantonly, or from neglecting to use reasonable care and diligence. Humes v. Knoxville, 1 Humph. 403. See Smith v. Washington, 20 How. 135; Macy v. Indianapolis, 17 Ind. 267; Himmelmann v. Hoadley, 44 Cal. 213.

¹ Parrot v. Cincinnati, etc., R.R. Co., 10 Ohio St. 624. The plaintiff averred that he owned and occupied as a residence certain property fronting a public street; that the defendant constructed along, upon, and over said street its railroad and run daily its locomotives and trains thereon; and that

smoke and cinders were cast and thrown from the engines on and over his property, thereby greatly damaging the same. It was held on demurrer, that a cause of action was stated. Stone v. Fairbury, etc., R.R. Co., 68 Ill. 394.

² Struthers v. Dunkirk, etc., R.R. Co., 87 Pa. St. 282. When there is nothing in the charter of a railroad company or statute requiring compensation to the owners of property on a public street, and where the fee of the street is in the town or city authorities authorizing the construction and operation of a railroad therein, the company is not liable for damages resulting to the premises of abutting lot owners not actually taken by the company in the

A street railroad company has the right to remove the snow from its tracks to the side of the street for the purpose of enabling its cars to pass along the track. But it will be restrained by injunction from leaving the snow so removed heaped up between the track and premises for a longer period than may be reasonably required for taking it away from the side of the street ; the use of no more of the street being granted than is necessary for the operation of the railroad. At the point this necessity ceases, the right to use the highway ceases. All other acts of omission or commission which involve a use of the street for snow, are therefore unlawful.¹ Where the trustees of a village are made by its charter commissioners of highways, they are to be regarded in respect to that function not as independent public officers, but as the agents of the corporation, so as to make the latter civilly responsible for their acts or omissions according to the law of master and servant.²

§ 286. Injury at railroad crossings.—When a railroad company constructs its line across a highway on a level, it is its duty to keep the crossing in a proper condition for the passing of vehicles, and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable.³ A street railroad company is liable to damages for injuries sustained by an individual by being thrown from his carriage in coming in contact with spikes protruding from the bed of the railroad; and it is immaterial whether or not the projection was caused by the failure of the city authorities to repair the

construction and lawful operation of the road. Colorado Cent. R.R. Co. v. Mollandin, 4 Col. 154. See Grand Rapids, etc., R.R. Co. v. Heisel, 38 Mich. 62.

¹ Prime v. Twenty-third Street R.R. Co., 1 Abb. Pr. N. C. 63. See Johnston v. Christopher, etc., St. R.R. Co., 1

Ib. 75, note; Christopher, etc., St. R.R. Co. v. Mayor, etc., Ib. 79, note.

² Conrad v. Ithaca, 16 N. Y. 158. See Lee v. Village of Sandy Hill, 40 N. Y. 442.

³ Oliver v. Northeastern R.R. Co., 9 Q. B. 409; Rex v. Kerrison, 3 M. & S. 526; Reg. v. Ely, 15 Q. B. 827; 19 L. J. 223.

street in the locality of the accident. "The defendants," said the court, "having undertaken to lay down a rail track along the avenue, which was a public road, they were bound to lay it down properly, and to see that it was kept in a proper condition thereafter; and it was for the jury to determine whether they had done so or not."¹

Although a railroad company which is authorized to extend its line through a public street is not liable at all events for the consequences of every accident which may thereby occur, yet it is its duty in constructing and maintaining its track to exercise reasonable care and skill, taking into view the place in which the track is laid.² A company in constructing its road found it necessary to place barriers across a highway to prevent travelers from falling into the chasm or deep cut. It afterward becoming necessary for the company to use the highway, the barriers were removed by persons in the company's employ who neglected to replace them, in consequence of which two persons driving along the highway in the night, were precipitated into the deep cut and injured. The town having been compelled to pay damages to the parties injured, it was held that it might maintain an action against the company for indemnity, although the section of the road where the accident happened had been let by the company to one N., who had contracted to make it for a stipulated sum, the work being done by him for the benefit, under the authority and by the direction of the company.³

Travelers should ordinarily look and listen for approaching trains, before attempting to cross a railroad track.⁴

¹ Fash v. Third Avenue R.R. Co., 1 Daly, 148.

² Mazetti v. N. Y. & Harlem R.R. Co., 3 E. D. Smith, 98; Burlington, etc., R.R. Co. v. Stumps, 69 Ill. 409; Cent. R.R., etc., Co. v. Letcher, 69 Ala. 106.

³ Lowell v. Railroad Corp., 23 Pick. 24.

⁴ Railroad Co. v. Houston, 95 U. S. 697. See Ernst v. Hudson River R.R. Co., 39 N. Y. 61; Havens v. Erie R.R. Co., 41 Id. 296; Van Shaick v. Hudson River R.R. Co., 43 Id. 527; Gorton v. Erie R.R. Co., 45 Id. 660; Davis v. N. Y., etc., R.R. Co., 47 Id. 400; Hackford v. N. Y., etc., R.R. Co., 53

Where the plaintiff, while crossing a railroad track in a wagon, was seriously injured by a passing train, and, after the accident, said that the employés of the company were not to blame, it was held that this statement was not conclusive as to his legal rights, but that it was the duty of the jury to consider the effect to be given to what the plaintiff said because of his situation, pain, and suffering at the time.¹ An obligation devolves upon railroad corporations to warn persons who may be passing, whether on foot or in a wagon, of the approach of trains, so that such persons may use the necessary caution to avoid the danger and keep out of the way of the train. It is not sufficient in all cases that the statutory signals have been given, to absolve a railroad company from the charge of negligence. Other precautions may be required under some circumstances, and there may be negligence which will charge the company besides the omission to sound the whistle or ring the bell.² Negligence cannot be predicated of an omission to keep a flagman; but when a flagman has been uniformly stationed at a crossing, the negligence of the flagman to give warn-

Id. 654; *McCall v. N. Y., etc., R.R. Co.*, 54 Id. 642; *Massoah v. Delaware, etc., Canal Co.*, 64 Id. 524; *Wheelock v. Boston, etc., R.R. Co.*, 105 Mass. 203; *Craig v. N. Y., etc., R.R. Co.*, 118 Id. 431; *Hinckley v. Cape Cod R.R. Co.*, 120 Id. 257; *Pa. R.R. Co. v. Beale*, 73 Pa. St. 504; *Same v. Ackerman*, 74 Id. 265; *Same v. Weber*, 76 Id. 157; *Weiss v. Pa. R.R. Co.*, 79 Id. 387; *Pittsburg, etc., R.R. Co. v. Krichbaum*, 24 Ohio St. 119; *Cleveland, etc., R.R. Co. v. Elliott*, 28 Id. 340; *Graws v. Maine, etc., R.R. Co.*, 67 Me. 100; *Robinson v. Western Pacific R.R. Co.*, 48 Cal. 409; *Hearne v. Southern Pacific R.R. Co.*, 50 Id. 482; *Rockford, etc., R.R. Co. v. Byam*, 80 Ill. 528; *Toledo, etc., R.R. Co. v. Shuckman*, 50 Ind. 42; *Morris, etc.,*

R.R. Co. v. Haslan, 33 N. J. 147; *Maker v. Atlantic, etc., R.R. Co.*, 64 Mo. 267; *Balt., etc., R.R. Co. v. Breining*, 25 Md. 378; *Same v. Boteler*, 38 Id. 568; *Frech v. Phila., etc., R.R. Co.*, 39 Id. 574; *Benton v. Cent. R.R. Co.*, 42 Iowa, 192; *Lynam v. Phila., etc., R.R. Co.*, 4 Houst. Del. 583; *Nashville, etc., R.R. Co. v. Smith*, 6 Heisk. Tenn. 174; *New Orleans, etc., R.R. Co. v. Mitchell*, 52 Miss. 808; *Johnson v. Canal, etc., R.R. Co.*, 27 La. Ann. 53; *Brown v. Milwaukee, etc., R.R. Co.*, 22 Minn. 165.

¹ *Funston v. Chicago, Rock Island & Pacific R.R. Co.*, 61 Iowa, 452, approving *Cooper v. Cent. R.R. Co.*, 44 Id. 134.

² *Dyer v. Erie R.R. Co.*, 71 N. Y. 228.

ing and properly discharge his duty, or in absenting himself from his post, is imputable to the company.¹

§ 287. Interference with natural flow of water.—A person owning land through or along which a watercourse passes, has a right as inseparably incident to his estate, to the beneficial use of the stream in its passage in its natural channel for all purposes for which it can be usefully applied to supply his cattle, to irrigate his land, and the like, or as a mill power; and no riparian proprietor higher up has a right to divert or corrupt it, or render it unfit for use; nor one below to obstruct its free passage, or to set it back upon the property of such owner. Where, therefore, a railroad company in constructing a bridge across a river diminished the width of the natural channel, penned up the water, and set it back on to the plaintiff's mill, it was held that he was entitled to recover damages against the company therefor; but not for being impeded and put to increased expense in getting logs up the river to his mill, the latter being a public, not a private wrong, to be redressed by a public prosecution.² It is the duty of a railroad company in constructing its road-bed to leave a space sufficient for the discharge of water through its accustomed drainway, whether natural or artificial. If it fails to do so, any owner whose land is injured, though a portion of his land is taken for the road, may compel the company to open the drain, and, if the obstruction causes a nuisance, the corporation may be compelled to abate it.³ In an action against a railroad com-

¹ *Dolan v. Del. & Hudson Canal Co.*, 71 N. Y. 285.

² *Blood v. Nashua & Lowell R.R. Corp.*, 2 Gray, 137. When the remedy under an act is against the person or persons erecting and maintaining a mill and dam to raise water for the use of the mill, an action will lie against a mill corporation coming within its provisions. And if there is no personal

liability imposed by the statute, the fact that certain parties who are stockholders are also almost wholly the owners of the mill benefited, will not change their relation as stockholders, or impose upon them individual liability for the acts of the corporation. *Inhabs. of Norton v. Hodges*, 100 Mass. 241.

³ *Raleigh & Augusta Air Line R.R. Co. v. Wicker*, 74 N. C. 220; *Walker*

pany for damages to the plaintiff's premises, a tenant for years, caused by the construction of an insufficient culvert, whereby the plaintiff's land was overflowed, it was urged that the injury was included in the special remedy given for the appropriation of the land under which the damages had been duly assessed long anterior to the plaintiff's lease. It was, however, held that no estimate of damages could be based upon an expectation that the company would omit its duty, or on the supposition that it would so negligently and unskillfully construct its work as to produce injury; or whether it would fail at all, was unknown, and could furnish no guide to govern the estimate. If the culvert was so unskillfully and negligently constructed as to be insufficient to resist the high water of the stream, the company would be liable to any one thereby injured.¹

Under an act incorporating a railroad company which provides that the company may construct its road across any stream of water, the company is bound, in crossing a stream with its road, by the same obligation which would

v. Old Colony, etc., R.R. Co., 103 Mass. 10. Where a railroad company purchases land for its use, it will be presumed that contingent damages which may arise from the turning of a river in a prudent and proper manner were taken into account in fixing the price, and the company will not be required to protect the bank from the effect of the water at all times. Norris v. Vt. Cent. R.R. Co., 28 Vt. 99; Henry v. same, 30 Id. 638.

¹ Pittsburg, etc., R.R. Co. v. Gilliland, 56 Pa. St. 445. See Hentz v. Long Island R.R. Co., 13 Barb. 646. In an action against a railroad company for damage to a mill caused by back water in consequence of an insufficient culvert, it is not a defense that by the inaccurate laying out of a public street a portion of the mill stands thereon. Houston & Gt. North-

ern R.R. Co. v. Parker, 50 Texas, 330. A railroad extended along an embankment upon low land between a river and the plaintiff's land. The low land was separated from the plaintiff's land by a bank which before the railroad embankment was made protected the plaintiff's land from the freshets of the river; but in consequence of the railroad embankment, the floods passed over the bank on to his land. It was held that the railroad company, though not required by its act to make flood openings in its embankment, yet as it might by proper caution have prevented the injury sustained by the plaintiff, an action on the case would lie against it for such injury. Lawrence v. Gt. Northern R.R. Co., 16 Ad. & El. N.S. 643; 71 Eng. C. L. 643; 20 L. J. N. S. Q. B. 293; 4 Eng. L. & Eq. 265.

have bound a private owner of the land and stream had he bridged it; and if the adjoining land is flooded in consequence of an alteration by the company of the banks of the stream and an obstruction of its channel, the owner of the land is entitled to recover damages therefor against the company.¹

In New Jersey it was decided that an owner of land adjoining a navigable stream might be deprived of all of his riparian rights and the benefits incident to his property from its contiguity to the water without compensation. But the chancellor, dissenting, said: "The right of an owner of land upon tide waters to maintain his adjacency to it and to profit by this advantage is founded upon a natural sense of justice which pervades the community, which, although the decisions of the courts may overcome, neither they nor the subtle and artificial reason of jurisconsults will ever eradicate."² Where the plaintiffs owned several lots fronting a navigable river, which they used in connection with their saw-mill in getting logs from the river to their mill and in shipping lumber therefrom, and a railroad company, by authority of the legislature, built a bridge over the river in such a manner as to obstruct the river front, it was held that the plaintiff was entitled to damages for the injury.³ When a railroad company is authorized by its charter to occupy the bed of a navigable lake in the construction of its road, the company is not relieved of its common law liability in case of injury to a riparian owner. Where, therefore, the plaintiffs owned land abutting upon such a lake, and the company, without their consent, constructed its road within the water of the lake so near the front of

¹ Brown v. Cayuga & Susquehanna R.R. Co., 12 N. Y. 486.

² Stevens v. Paterson & Newark R.R. Co., 34 N. J. 532, 556.

³ Chapman v. Oshkosh & Miss. R.R. Co., 33 Wis. 629. See Bowman v.

Wathen, 2 McLean, 376; Arimond v. Green Bay & Miss. Canal Co., 31 Wis. 316; Railroad Co. v. Schumeir, 7 Wall.

272. *Contra*, Gould v. Hudson River R.R. Co., 6 N. Y. 522; Tomlin v. Dubuque, etc., R.R. Co., 32 Iowa, 106.

the plaintiffs' land as to cut off their access to the body of the lake, leaving in front of their land stagnant water, by which the land was depreciated in value, it was held that the plaintiffs were entitled to recover such damages for this infringement upon their riparian rights as they had sustained.¹

A railroad company has no right, by an embankment or other artificial means, to obstruct the natural flow of surface water, and thereby force it in increased quantity upon the land of another, and the company will be liable to the owner of the land for the injury he may sustain by such acts, without regard to any question of negligence or unskillfulness in the construction of the road.²

There having been a heavy fall of snow, a street railroad company, in clearing its track, threw the snow off toward the curb, making a bank of snow in one street and across another, thereby obstructing the natural flow of water at the intersection of the two streets. Large quantities of rain falling that night, a dwelling-house, the first story of which was several feet below the level of the street, was flooded with water. In an action by the owner of the house against the railroad company to recover damages for the injuries thus sustained, it was held that the following instruction of the court below was proper: If the jury should find that the company exercised ordinary care in the management of its track on the street in the removal of the snow therefrom, and clearing out the gutter along the street at the side of the track, and the damage sustained by the plaintiff was attributable either to the conformation of the ground and situation of his premises or to a storm of such extraordinary severity that the usual drain-

¹ *Delaplaine v. Chicago & Northwestern R. R. Co.*, 42 Wis. 214. *trop. Board of Works v. McCarthy*, 7 Id. 243.

See *Lyon v. Fishmongers Co.*, L. R. 1, App. 662; *Buckleuch v. Metrop. Board of Works*, 5 House of Lds. 418; *Me-* ² *Toledo, etc., R.R. Co. v. Morrison*, 71 Ill. 616.

age provided by the city could not carry the water off, their verdict should be for the defendant. ALVEY, J., in the course of a dissenting opinion, said : "It was not the simple fact of removing the snow from the road track that gave rise to the injury, but it was the banking of the snow along the street that caused the water to flow upon the premises of the plaintiff ; and, assuming that to be the real cause of the injury, it resulted not from the normal, but the changed or altered condition of the snow, and the failure of the defendant to guard against the possibility of the snow in that condition and in that place, producing injury to the adjoining property-owners. In such case the result of the act is the test of liability, and I can perceive no more propriety in making that liability to depend upon a question of negligence to be passed upon by the jury as to the manner of using the road track or the removal of the snow therefrom, than there would be in making the liability of a defendant in an ordinary action for assault and battery depend upon the question of negligence by the defendant in the commission of the wrong alleged."¹

Where it was sought to recover damages against a railroad company, caused by the negligent construction of a bridge across a river so that a pier turned the water in time of freshets upon the plaintiff's land, it was proved that the pier complained of was built in the bed of the river at right angles with the direction of the road, but obliquely to the course of the river ; that formerly in time of freshets the water spread over the meadows and was a benefit to the land from the deposits ; but that now the water, striking this pier, was turned from its natural course upon the plaintiff's land and had heaped up sand in different places, killing the grass and changing the level ; that a hole in the bank had been made by the water so turned, and that the bed of the river below the pier had in some places been

¹ Short v. Balt. City Passenger R.R. Co., 50 Md. 73.

filled up by the eddies produced ; that the bridge was so built because it was considered stronger, safer, and less expensive ; that a pier in the direction of the stream would be longer and require more masonry ; that it was better to have the piers at right angles with the road, so that the wheels on both sides of the engines might strike simultaneously, otherwise the strain would be unequal and the tendency be to produce a rocking motion ; that in the construction of the bridge the land was not thought of and no precautions taken to prevent its being washed away, and if the engineer had been told he must protect the land, he would have made a water wall. It was held that the plaintiff was entitled to a verdict for the injury to his land, although he had previously conveyed a portion of the land to the company, and, in consideration of the purchase money, released any damages that might be awarded by commissioners.¹

In an action against a railroad company for discharging water upon the plaintiff's land, it was held that if the company conducted water from natural springs in an artificial channel to the plaintiff's land, the company would be liable to an action at common law for the injury, unless it could justify the act on the ground of necessity under the authority conferred by its charter ; and that it made no difference in the plaintiff's rights that the water in the trench was not discharged in a stream from the outlet, but was poured through the loose earth and stones of the railroad embankment ; nor that no water came upon the plaintiff's land exclusively from the spring water in the cut, but only when

¹ Spencer v. Hartford, Providence & Fishkill R.R. Co., 10 R. I. 14. The commissioners for the assessment of damages for property taken by a corporation for its use under the right of eminent domain are bound to presume that the corporation will construct its works so as not to do unnecessary in-

jury. They cannot lawfully award damages upon a contrary supposition, and a failure on the part of the corporation in this respect will make it liable to any one who may sustain loss or injury by reason of its negligence. South Side R.R. Co. v. Daniel, 20 Gratt. 344.

the spring water was swollen by the drainage of the cut and the adjacent land caused by rain or melting snow.¹ A city was held liable for diverting, in the grading of a street, the natural flow of water and turning it upon the plaintiff's premises. It was said that as an individual, in the exercise of the right of improving his land, could not lawfully turn a stream of water upon the land of another, so neither had a corporation such right; the constitutional guaranty that private property shall not be taken for public use without compensation being applicable to such a case, and the owner, to the extent to which he was deprived of the legitimate use of his property, being entitled to compensation.²

§ 288. Causing death of person.—At common law a civil action could not be maintained for the destruction of human life whether the act which caused the death was or was not felonious.³ Such an action could only be sustained by a husband for the killing of his wife where some period intervened between the time of the injury and the time of dissolution during which he could be said to have suffered the loss of her service and society, incurred expense, and undergone anxiety on her account, which he could not do when life departed at the instant the shock was received. This was a narrow ground on which to place a right of recovery; but there was no other on which the common law rule could be overcome, which declared that the mere death of a human being could not be complained of as a civil injury to be

¹ *Curtis v. Eastern R.R. Co.*, 98 Mass. 428. Where, in an action by the owner of land against a canal company, it appeared that the company managed its canal prudently and judiciously, and did no injury to the plaintiff's land except the voluntary turning of the water of the canal through a waste-weir conducted upon and over the plaintiff's land, injuring the same no further than was necessary to pro-

tect the canal from imminent danger in consequence of surplus water, it was held that he was entitled to recover damages for such injury. *Hooker v. New Haven & Northampton Co.*, 15 Conn. 312.

² *Nevins v. City of Peoria*, 41 Ill. 502.

³ *Wyatt v. Williams*, 43 N. H. 102; *Kramer v. Market Street R.R. Co.*, 25 Cal. 434.

compensated in damages.¹ In *Glassholm v. Barker*² the Master of the Rolls, in a case of collision at sea by which eight sailors lost their lives, said : "The history of legislation on this subject is of considerable interest, showing as it does the progress of the legislation in adapting itself to the wants of society. Previous to the 9 & 10 Vict., ch. 93,³ no action was maintainable against any person who by his wrongful act had caused the death of another. Injury to the person only created a right of personal action in the party injured, and if the injury was fatal the right of action perished with that party. Lord Campbell's act gave a right of action to the legal personal representatives of the party killed for the benefit of the wife, husband, parent, or child of that person."

In Maine, Massachusetts, New Hampshire, Connecticut, and Rhode Island, the remedy is by indictment. In Maryland the action must be brought in the name of the State, though in form civil, and is for the benefit of the person entitled to damages. In most of the other States the statutes authorize a civil action for damages. But in these different forms of proceeding the same end is to be attained, and substanti-

¹ *Green v. Hudson River R.R. Co.*, 28 Barb. 9, aff'd 2 Abb. Ct. of App. Decis. 277. See *Osborn v. Gillett*, 8 Exch. 88; *Baker v. Bolton*,¹ Camp. 493.

² 12 L. T. N. S. 317.

³ Lord Campbell's Act. By a supplement of 27 & 28 Vict., ch. 95, passed July 29, 1864, it was enacted that if no such suit should be brought by any executor or administrator within six calendar months after the death of such deceased person, the action might be brought in the names of all or any of the persons interested, and should be for the benefit of all; and, as by the first act, the sum recovered was to be divided between the parties entitled in such shares as the jury should by their

verdict direct, the defendant was allowed to pay into court one sum as a compensation to all parties entitled, without specifying the shares into which it was to be divided by the jury. Under Lord Campbell's act, the damages to be recovered are the pecuniary loss sustained by the family of the deceased, and not what might have been claimed by the party injured if death had not resulted. It does not include the loss or suffering of the deceased, nor the mental suffering of the survivor occasioned by such death, and it excludes exemplary damages. The damages are to be simply compensatory for the pecuniary loss sustained by the surviving family by reason of the death.

ally the same rules to be applied.¹ Under the statute of Maine,² if the injury is such as not to produce immediate death, a right of action accrues to such person, which, in case of his subsequent death, survives to his personal representatives, and an indictment will not lie.³ In Massachusetts a statute similar to the foregoing has been differently construed, and the remedy by indictment held not to be limited to cases where the death is instantaneous, the purpose being to inflict punishment as well as to secure compensation to the family of the deceased.⁴ In the latter State, on an indictment against a railroad company to recover a fine for the use of the widow and children of a person killed on the road, it must be made to appear that the deceased was a passenger at the time of the accident, and that his death was occasioned by the negligence or carelessness of the company, or the unfitness or gross negligence of its servants or agents.⁵ A person whose regular business is to sell popped corn to passengers on the trains, and who for that purpose holds a season ticket renewed every quarter, and travels over the road substantially every day, is a passenger within the meaning of the statute; and a condition printed on the back of his ticket that "The corporation assumes no liability for any personal injury received while in a train to any season-ticket holder" will not relieve the company from its legal liability.⁶

In an action against a railroad company for the negligent killing of the plaintiff's intestate, it appeared that the injury was received by the intestate after the sale of the road, fixtures, etc., by the assignee in bankruptcy, which was made subject to confirmation by the court, and that this was not

¹ *State v. Manchester & Lawrence R.R.*, 52 N. H. 528.

⁴ *Com. v. Metropolitan R.R. Co.*, 107 Mass. 236.

² *Rev. Sts.*, ch. 51.

⁵ *Genl. Sts. of Mass.*, ch. 63, sec.

³ *State v. Maine Cent. R.R. Co.*, 60 Me. 490; *State v. Grand Trunk R.R. Co.*, 61 Id. 114, 145.

⁶ 97.

⁶ *Com. v. Vt. & Mass. R.R. Co.*, 108 Mass. 7.

obtained and the property conveyed to the purchasers until some time thereafter. It was held that the purchasers were not liable, they having no right to intermeddle with the road, and there being no evidence that they in fact did so before the confirmation of the sale and conveyance of the property.¹

Where an action is brought by a widow and administratrix against a city for pecuniary loss occasioned by the negligence of the city authorities causing the death of her husband, it must be proved that the deceased exercised reasonable care and caution, all things considered, as they existed at the time, a different degree of care being requisite in the night-time from what ought to be used during the day.²

§ 289. Forceable removal of passenger from public conveyance.—Although a railroad company cannot in general discriminate between persons, and, under a charter providing that no person shall be excluded from the company's cars on account of color, colored persons are entitled to equal accommodations with whites; yet an exception may be observed in relation to gamblers who seek the trains for the purpose of plying their vocation, and those who are grossly intoxicated.³ Notwithstanding no one can be ex-

¹ Metz v. Buffalo, etc., R.R. Co., 58 N. Y. 61.

² Brady v. Chicago, 4 Biss. 448. See Telfer v. Northern R.R. Co., 30 N. J. 188; Jones v. Louisville, etc., R.R. Co., 82 Ky. 610. Where an injury is occasioned by a collision of the trains of two railroad companies, the negligence of the one carrying the person injured, will not prevent his recovery from the other company whose negligent act contributed to the injury. Union R.R. & Transit Co. v. Shacklett, 19 Ill. App. 145.

In an action against a railroad company for negligently causing the death of an employé of the company, it ap-

peared that the deceased was a switchman; that at the time of his death he was standing on the sideboard of the locomotive attached to a freight train, and that while the train was passing through a shed he was knocked or dragged off of the footboard by coming in contact with the shed, the cars passing over his body, causing instant death. It was held that the company was liable, the court remarking that even if the deceased was guilty of slight negligence, the plaintiff's right of recovery would not thereby be defeated. Ill. & St. Louis R.R. Co. v. Whalen, 19 Ill. App. 116.

³ Indianapolis, etc., R.R. Co. v.

cluded from a carriage by a public carrier on account of color, religious belief, political relations, or prejudice, it is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well-known repugnances, and therefore a rule which requires a colored woman to occupy a separate seat in a car equally as comfortable and safe as that furnished for other passengers, is not improper.¹ It is a reasonable and lawful regulation of a railroad company that one car shall be set apart for females traveling alone, or with male relatives or friends. Where a company, in order to insure the observance of this rule, hung out placards giving notice of it, and placed its agent at the door of the car, whose daily duty it was to keep the car free from males going without females, it was held that though he might have exceeded not only his instructions, but the right of the company to use force, yet if he did so in excess of zeal or impetuosity of natural temper, and without malice toward the person removed, and with no purpose of his own, the company was liable for the act.² A brakeman was stationed at a railroad car to direct passengers who might attempt or desire to enter. The plaintiff disobeyed his direction, whereby the former forcibly ejected him. There was no evidence that the brakeman had been specially instructed to remove any one from the car by force, but he was placed in charge to direct passengers with a view to their orderly and proper arrangement therein. It was held that the brakeman must be deemed to have been acting within the scope of his employment, and that the company was liable

Rinard, 46 Ind. 293; Railroad Co. v. Brown, 17 Wall. 445; Thurston v. Union Pacific R.R. Co., 22 Int. Rev. Rec. 251; Pittsburg, etc., R.R. Co. v. Vandyne, 57 Ind. 576. See Milliman v. N. Y., etc., R.R. Co., 66 N. Y. 642; Thurston v. Union Pacific R.R. Co., 4 Dillon, 321.

¹ Westchester & Philadelphia R.R. Co. v. Miles, 55 Pa. St. 209. ² Peck v. N. Y. Cent. & Hudson River R.R. Co., 70 N. Y. 587; 8 Hun, 286; Toledo, etc., R.R. Co. v. Williams, 77 Ill. 534. See McRae v. Wilmington, etc., R.R. Co., 88 N. C. 526.

if he used excessive and unnecessary force in removing the plaintiff from the car.¹

Corporations may be charged in trespass for personal injuries committed by their agents under their express order. They may also be so charged in all cases where such personal violence would be the probable and natural consequence resulting from the execution of the order given to their agents. But doubts and differences of opinion arise where the order to remove a person might be executed in a manner which in law would constitute no breach of the peace, nor subject any party to any liability for executing it. In cases of this character, where the agent in the execution of the order does it with such violence and in such a careless or wanton manner as to inflict an unjustifiable personal injury upon the person ordered to be removed, the position has sometimes been maintained that the principal is not liable at all, or, if liable, that a claim for damages can only be enforced in an action on the case, and not in an action of trespass.² In California, where in an action for excluding a person from a car, it appeared that the refusal of the conductor to permit the plaintiff to enter, proceeded purely from his own malice, and was in violation of the express orders of the company, it was held that the company was nevertheless liable for the actual damage sustained by the plaintiff by reason of such refusal; but that if the conduct of the conductor was accompanied by violence and personal indignity, he alone was responsible for such

¹ Peck v. N. Y. Cent. & Hudson River R.R. Co., *supra*. See Higgins v. Watervliet, etc., R.R. Co., 46 N. Y. 23; Cosgrove v. Ogden, 49 Id. 255; Rounds v. Del., Lac. & W. R.R. Co., 2 N. Y. W. Dig. 260. If a railroad company fail to transport a passenger with proper dispatch, and injury thereby results to such passenger, the company will be liable; and it is immaterial whether the delay was caused by the wilful act, or

the negligence of the conductor or other agent of the company, if such act or negligence was within the scope of his employment and authority. Weed v. Panama R.R. Co., 17 N. Y. 362, aff'g s. c. 5 Duer, 193.

² See Moore v. Fitchburg R.R. Co., 4 Gray, 465; Hewitt v. Swift, 3 Allen, 420; Orr v. Bank of U. S., 1 Ohio, 36; Weed v. Panama R.R. Co., 5 Duer, 193.

damages as the party might be entitled to for this cause beyond the actual damage resulting from the exclusion from the car, unless the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly unauthorized, the company was liable for the actual damage, and the conductor alone for the punitive damages, if any.¹ In England, where in an action on the case, it appeared that the conductor of a public conveyance ejected a passenger for what the conductor deemed improper conduct, and in doing so committed acts of personal violence to such a degree as to cause great injury to the party, the principal was held liable, notwithstanding the argument was pressed upon the court that the conductor was a trespasser, and that the principal ought not to be deemed liable for a trespass committed by his agent.² In a case where a passenger in the defendant's omnibus was removed by the conductor in such a manner that the plaintiff fell into the road, and was severely injured, MARTIN, B., said : "I have no doubt that if the conductor used unnecessary violence in removing the plaintiff, the master would be responsible. If, by an act done by a servant within the scope of his ordinary employment, another person is injured, that person may maintain an action against the master; and the act of removing the plaintiff from the omnibus was within the scope of the conductor's ordinary employment. The criterion is not whether the master has given authority to do the particular act, but whether the servant does it in the ordinary course of his employment."³ The plaintiff, a passenger on the defendant's railroad, sustained injuries in consequence of being violently pulled out of a car just after the train had started by one of the defendant's porters, who acted under

¹ Turner v. North Branch & Mission R.R. Co., 34 Cal. 594. See Hays v. Houston, etc., R.R. Co., 46 Texas, 272.

² Greenwood v. Seymour, 4 L. T. N. S. 835.
³ Seymour v. Greenwood, 30 L. J. Exch. 189, 327.

an erroneous impression that the plaintiff was not in the right train. The defendant's rules, a copy of which was given to each porter, assigned various specific duties to the porters, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the company. It was proved to be the duty of the porters to prevent passengers from going by wrong trains as far as they could do so, but not to remove them from the wrong train. It was held that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the car, was an act done within the scope of his employment as the defendant's servant, and one for which the company was liable.¹ The guard of the defendant's omnibus, in removing a passenger whom he deemed to be drunk, forcibly dragged him out, and threw him on the ground, whereby he was severely injured. The passenger brought an action for the injury, and the defendant claimed that he had not authorized and was not liable for the acts of the servant. WILLIAMS, J., in delivering the opinion of the court, said : "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion ; or, in other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. It is said that, though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the

¹ Bayley v. Manchester, etc., R.R. 365; Sandford v. Eighth Avenue R.R. Co., L. R. 8, C. P. 148. See Moore v. Co., 23 N. Y. 343; Balt. & Ohio R.R. Fitchburg R.R. Co., 4 Gray, 465; Co. v. Blocher, 27 Md. 277. Penn. R.R. Co. v. Vandiver, 42 Pa. St.

master, by giving the guard authority to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place. Therefore, if the guard forms a wrong judgment, the master is responsible.”¹

In order to justify the expulsion of a passenger from a railroad train for refusing to pay the difference between the ticket-fare and the regular car-fare, when a ticket is not purchased, the company must afford passengers reasonable and proper opportunity to avail themselves of the advantage of such a discrimination in fares. What is a reasonable time for the purchase of tickets, is to be determined by the jury, under the instructions of the court.² If a person applies at the ticket-office of a railroad company at a suitable time to a proper person, and a ticket is refused him without his fault, he has a right to take a seat in the cars, and to be transported, on the payment when demanded of the sum charged those who purchase tickets. If, when called upon for his fare, he offers to pay the usual price charged those purchasing tickets, and the conductor refuses to accept it, but demands a greater rate, he may pay the excess demanded of him under protest, and then sue the company, and recover it back, but is not obliged to do so. If, in consequence of his refusal to pay the excess, the conductor ejects him from the train, the company is liable, and

¹ Seymour v. Greenwood, *supra*; 7 Miss. 66; Moore v. Chicago R.R. Co., H. & N. 356. See to a similar effect, 55 Id. 243. See Crocker v. New London-Higgins v. Watervliet Turnp. Co., 46 Conn. 249; N. Y. 23; Passenger R.R. Co. v. Swan v. Manchester, etc., R.R. Co., Young, 21 Ohio St. 518. 132 Mass. 116; Pullman Palace Car

² Cochran v. Toher, 14 Minn. 391; Du Laurans v. First Division of St. Paul, etc., R.R. Co., 15 Id. 49; Forsee v. Ala. Gt. Southern R.R. Co., 63 Co. v. Reed, 75 Ill. 125; Evans v. Memphis, etc., R.R. Co., 56 Ala. 246; Yorkton v. Milwaukee, etc., R.R. Co., 54 Wis. 234.

the amount of damages will depend upon the time, place, circumstances, and manner of his ejection.¹

Where a party enters a car for the purpose of going to M., and not elsewhere, and with no intention of leaving the train at J., and does not do so until forcibly ejected by the conductor, the law will not imply a contract upon his part to pay his fare at the regularly established rates for the distance traveled before his expulsion.² A passenger who refuses to pay fare has no lawful right to be carried to the next station. There may be public considerations, such as the danger of collision resulting from stopping trains between stations, or the peril of the traveling public consequent upon the increase of speed necessary to regain time thus lost, which will justify the enactment of a law that the expulsion must occur at a station. These considerations, however, form no basis for a claim by a passenger to be carried gratuitously from one station to the next.³

If a passenger on a railroad train persists in violating the reasonable rules of the company, after notice and a request not to act contrary to them, the carrier may rescind the contract for his conveyance, and refuse to carry him further. But an uncivil word by a passenger at the beginning of his journey, will not justify the carrier's servants in treating him with insolence to the end of it; nor will an assault, or resistance to the performance of a duty, justify the servant in pursuing and punishing the passenger after the assault or the resistance is over.⁴

Where a person is wrongfully on a railroad train, and, upon his refusal to leave it, strikes the men who put him out, claiming a right to strike and struggle to any extent

¹Jeffersonville R.R. Co. v. Rogers, 38 Ind. 116.

⁴Hanson v. European & North Am. R.R. Co., 62 Me. 84. See Pease v.

²Du Laurans v. First Division of St. Paul, etc., R.R. Co., *supra*.

Del., Lack. & Western R.R. Co., 101 N. Y. 367.

³Jeffersonville R.R. Co. v. Rogers, 28 Ind. 1.

in self-defense against the violence which he alleges was committed upon him by blows and otherwise, the burden is on him to prove that his own illegal acts did not in any degree contribute to his injury, but that it was wholly caused by the company's servants.¹ An order by the conductor of a railroad train to a person to get off of the car, accompanied by a show or demonstration of force sufficient to impress the person with the belief that force will be employed, is equivalent to proof of the employment of force.² A person who is ejected from a railroad car with unjustifiable violence is not bound to give the parties who are putting him out notice of a physical infirmity; though it might have been otherwise if they were using reasonable force to expel him, and that force was doing him an injury by aggravating some secret disease.³ In an action against a railroad company for being forcibly removed from the train, it is competent for the plaintiff to prove what was his state of health and the condition of his clothing shortly after his expulsion from the car, as tending to show the character of the treatment he received from the employés of the company, and the danger to which he was subjected by reason of his sickness and exposure.⁴

¹Coleman v. New York & New Haven R.R. Co., 106 Mass. 160. Where a passenger is lawfully ejected from a railroad train, even if more force and violence than necessary were used, the plaintiff cannot recover therefor in an action for an alleged unlawful removal. If his removal was justifiable, and he would recover damages for the improper manner in which it was effected, such should be the cause of action alleged by him. Logan v. Hannibal, etc., R.R. Co., 77 Mo. 663; Johnson v. Railroad Co., 46 N. H. 213. A conductor having taken from a gentleman and his wife railroad tickets which they had purchased for L., told them the

train did not usually stop there, but that it probably would that day. The train not having stopped there, and the conductor having used insulting language to them in relation to its not having done so, it was held that the company was not liable to damages for such language. Parker v. Erie R.R. Co., 5 Hun, 57. See Ill. Cent. R.R. Co. v. Downey, 18 Ill. 259.

²Kline v. Centr. Pacific R.R. Co., 39 Cal. 587.

³Coleman v. N. Y. & New Haven R.R. Co., *supra*.

⁴Indianapolis, etc., R.R. Co. v. Anthony, 43 Ind. 183.

The power vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the duty to exercise the power when called upon by passengers to do so in a proper case. A failure to discharge this duty stands to some extent upon the same footing as the omission to perform any other official duty, and renders the corporation liable. Knowledge or opportunity to know that injury was threatened, must be brought home to the conductor, and it must be shown that his prompt intervention might have prevented or mitigated it. The power at his disposal consists of the train hands and willing passengers. Ordinarily, exemplary damages should not be awarded, unless there was a refusal or failure to interfere when called upon, or the injury occurred in the presence of the officer who could have prevented it.¹

§ 290. Loss of freight.—Railroad companies as common carriers may make valid contracts to carry beyond the limits of their own road, and thus become liable for the acts and neglects of other carriers not under their control. Although such corporations are not allowed to assume obligations altogether beyond the objects of their incorporation, yet, within the general business of their creation, considerable latitude is allowed in contracts with strangers. If the corporators acquiesce in the extension of the business of the company beyond the strict limits of the charter, and strangers are thereby induced to contract upon the faith of the authority of the agents of the company, it is not at liberty to repudiate the authority of such agents when their transactions prove disastrous.² When several railroad com-

¹ New Orleans, etc., R.R. Co. v. Schenectady R.R. Co., 19 Wend. 534; Burke, 53 Miss. 200.

² Noyes v. Rutland & Burlington R.R. Co., 27 Vt. 110; Farmers' & Mechanics' Bank v. Champ. Trans. Co., 23 Id. 186; Weed v. Saratoga &

Schenectady R.R. Co., 19 Wend. 534; Jordan v. Fall River R.R. Co., 5 Cush. 69; Houston, etc., R.R. Co. v. Hill, 43 Texas, 381. See Illinois, etc., R.R. Co. v. People, 19 Ill. App. 141.

panies owning separate lines which together form a continuous route enter into an agreement by which at either end of the route tickets and checks for luggage can be procured for the entire distance, a person purchasing such a ticket and at the same time receiving a check, may recover of the company of which the ticket was purchased for a failure to deliver his luggage at the end of the route.¹ A parcel was delivered at L. to the L. and P. railroad company, directed to a place in Derbyshire. The person who took it to the station offered to pay the charges, but the agent of the company said they had better be paid on delivery. The L. and P. railroad company was known to own the line only as far as P., where the railroad connected with another line, and beyond that with a third line, and so on into Derbyshire. The parcel was lost after it was forwarded from P. It was held that the L. and P. railroad company was liable. The judge charged the jury that when a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although beyond the limits of his ordinary duty as a carrier.²

A passenger on a railroad is not bound at once to de-

¹ Weed v. Saratoga, etc., R.R. Co., 19 Wend. 534; Hart v. Rensselaer, etc., R.R. Co., 4 Seld. 37; Bard v. Poole, 2 Kern. 495; Quimby v. Vanderbilt, 17 N. Y. 306; Bank of Augusta v. Earle, 13 Pet. 587. See Wood v. N. Y. & New Haven R.R. Co., 22 Conn. 1; Naugatuck R.R. Co. v. Waterbury Button Co., 24 Id. 468. A railroad company which has a lease of part of another connecting line cannot absolve itself from liability to the owner of freight delivered to it on the portion which it has leased under an arrangement with that company that each cor-

poration shall furnish suitable accommodations for freight, receiving and delivering it, and that the liability for freight shall not be incurred until received on the cars. McCluer v. Manchester & Lawrence R.R. Co., 13 Gray, 124.

² Muschamp v. Lancaster & Preston Junction R.R. Co., 8 Mees. & Welsb. 421. See Watson v. Ambergate, etc., R.R. Co., 15 Jur. 448; 3 Engl. L. & Eq. 497; Scotthorn v. South Staffordshire R.R. Co., 22 L. J. N. S. Exch. 121; 17 Jur. 214; 8 Exch. 341; 18 Engl. L. & Eq. 553.

mand his luggage, but has a reasonable time within which to make the demand, and the liability of the railroad company continues until such reasonable time has elapsed, to be determined from the circumstances of each case. If the luggage be left beyond a reasonable time, the character of the bailment changes, and the company is liable as warehouseman simply, to be charged only for want of ordinary care.¹ In *Cary v. Cleveland & Toledo R.R. Co.*,² a lady paid for a passage, and was furnished with tickets from Toledo to Buffalo over the defendants' railroad and intermediate roads, the defendants' agent receiving the fare for the whole distance. The train upon which she was a passenger was due at Buffalo at five o'clock in the afternoon, and in time to connect with a train going east, but was detained by obstructions, and did not arrive until about ten o'clock at night, and after the eastern train had left. Three passenger trains arrived at the same time, carrying an unusual crowd of passengers, and a corresponding accumulation of luggage, so much so that the usual places for storing it were insufficient for the purpose. It was an inclement night, and it took until nearly twelve o'clock to dispose of the luggage which the servants of the railroad companies were ready and offered to deliver, and did deliver such as was claimed. The car in which she was a passenger could not enter the depot for want of room, and she went directly

¹ *Cary v. Cleveland & Toledo R.R. Co.*, 29 Barb. 35, per ALLEN and MULLIN, JJ. BACON, J., dissenting, maintained that the liability ceases immediately on the arrival of the cars at the place of destination and the readiness or offer of the agent of the company to deliver the luggage. See *Powell v. Myers*, 26 Wend. 591; *Cole v. Goodwin*, 19 Id. 251. Where the negligence of a railroad corporation concurs in and contributes to the injury of freight, the company is not exempt from lia-

bility on the ground that the immediate damage is occasioned by the act of God or inevitable accident. *Michaels v. N. Y. Cent. R.R. Co.*, 30 N. Y. 564; *Read v. Spalding*, Ib. 630; *Bailwick v. Balt. & Ohio R.R. Co.*, 45 Id. 712; *Pruitt v. Hann. & St. Jo. R.R. Co.*, 62 Mo. 527. See *Morrison v. Dam*, 20 Pa. St. 171; *Denny v. New York Cent. R.R. Co.*, 13 Gray, 481; *Railroad Co. v. Reeves*, 10 Wall. 176.

² *Supra*.

to a hotel, retaining the check as a voucher for her trunk. The depot building, with much of the luggage, was destroyed by fire that night, and her trunk could not be found when she called for it the next morning. It was held that the company was liable for the value of the trunk. In Massachusetts it was held that a railroad company which transports goods over its road for hire, and deposits them in a warehouse without additional charge until the owner or consignee has a reasonable time to take them away, is not liable as a common carrier for the loss of the goods by fire without any negligence or default on its part after the goods are unloaded and placed in its warehouse, although the owner or consignee has no opportunity to remove the goods before they are destroyed. SHAW, C. J., said the contract was that the company would carry the goods safely to their destination, and there discharge them on the platform and deliver them if the owner was ready to take them, or if not, to keep them in some safe place a reasonable time, to be delivered when called for. "This," he remarked, "we consider to be one entire contract for hire, although there is no separate charge for storage, yet the freight to be paid fixed by the company as a compensation for the whole service is paid as well for the temporary storage as for the carriage. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities; first, that of common carriers, and afterward that of keepers for hire, or warehouse-keepers.¹

A statute enacted that railroad companies in the State should be liable as common carriers for the transportation of all freight and luggage received by them, any obligation that might be entered into between said railroads and other parties to the contrary notwithstanding. The charter of a

¹ Norway Plains Co. v. Boston & Me. Boston & Providence R.R. Co., 10 R.R. Co., 1 Gray 263. See Thomas v. Metc. 472.

railroad company provided that "it should be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad."¹ A bill of lading of cotton, which was shipped at the owner's risk as to all damages, or injury by fire while in the course of transportation, was signed by the owner, as well as by the agent of the railroad company. The cotton was destroyed by fire without the consent or negligence of the agents of the company, whilst in the regular course of transportation on the railroad; and a judgment for its full value having been obtained by the owner against the company, the point submitted for the decision of the appellate court was whether the company had a right to limit its liability by special contract, and provide against responsibility for losses by fire, if such special contract did not attempt to cover losses occasioned by negligence or misconduct. It was held that as there was nothing in the company's charter which enabled it to exempt itself by special contract from its common law obligations, or to limit the extent of its liability, the judgment must be affirmed.²

In *Railroad Co. v. Lockwood*,³ BRADLEY, J., in delivering the opinion of the Supreme Court of the United States,

¹ Although a railroad company is in one sense a private corporation, yet the paramount object of the legislature in creating such a corporation is the interest of the public. It is bound to receive and carry all goods offered for transportation, and is liable to an action upon refusal to do so without sufficient cause. An express company engaged in the business of transporting small packages is as much entitled to the benefits of a railroad as the owners of the packages. Its agents are entitled to equal privileges with other persons, and no ex-

clusive advantages can be granted to the latter to its injury. While a railroad corporation has the power to regulate transportation on its road, this does not carry with it the right to exclude any particular individuals, or to grant to some the exclusive privilege of transportation. A regulation to be valid must operate on all alike. *Sanford v. Catawissa, etc., R.R. Co.*, 24 Pa. St. 378.

² *Mobile & Ohio R.R. Co. v. Franks*, 41 Miss. 494.

³ 17 Wall. 357.

said : "The great hardship on the carrier in certain special cases where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation ; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded. The question is whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard. . . . It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried except as against the act of God or public enemies. The civil law excepts also losses

by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels respecting which no contract is made. Is the company a public carrier as to the twenty parcels, and a private carrier as to the one? A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of

the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character. But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. Now to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption

from liability, that men must be permitted to make their own agreements, and that it is of no concern of the public on what terms an individual chooses to have his goods carried. Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often indeed without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. The conclusions to which we have come are,—First, that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants; secondly, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these rules apply to carriers of goods and carriers of passengers for hire, and with special force to the latter.”¹

¹ See Cole v. Goodwin, 19 Wend. 257; 181; Perkins v. same, Ib. 196; Smith v. Gould v. Hill, 2 Hill, 623; N. J. Steam-boat Nav. Co. v. Merchants' Bank, 6 v. same, 29 Barb. 132; 24 N. Y. 222; Bissell v. same, 29 Barb. 602; Stinson How. 344; Dorr v. N. J. Steam v. same, 32 N. Y. 337; Farnham v. Nav. Co., 4 Sandf. 136; Stoddard v. Camden, etc., R.R. Co., 55 Pa. St. 62; Long Island R.R. Co., 5 Id. 180; Parsons v. Monteath, 13 Barb. 353; Moore v. Pennsylv. R.R. Co. v. Henderson, 51 v. Evans, 14 Id. 524; Welles v. N. Y. Id. 315; Welsh v. Pittsburg, etc., R.R. Cent. R.R. Co., 26 Id. 24; 24 N. Y. Co. v. Curran, 19 Id. 1; Fillebrown v.

§ 291. Injury of passenger by railroad accident.—Whatever human care, vigilance, and foresight can reasonably do consistently with the mode of conveyance and the practical operation of a railroad, is required of a company employed in transporting passengers. It is not its duty, in order to make travel on its road absolutely free from peril, to incur a degree of expense that would render the operation of the road impracticable. It would be unreasonable to insist that the road-bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties subject to decay would be avoided; but not to require that, although a railroad company may use ties of wood, such ties shall be absolutely sound and roadworthy.¹ Although, in an action against a railroad company by a passenger to recover damages for an injury, the burden of showing negligence on the part of the defendant rests in the first instance upon the plaintiff; yet when he has proved a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to show that the injury was caused without the fault of the company.² Where habits of intoxication in the conductor of a railroad train are shown, it raises in the case of an accident a presumption of negligence, and casts upon

Grand Trunk R.R. Co., 55 Me. 462; Sager v. Portsmouth, 31 Id. 228; School Dist. v. Boston, etc., R.R. Co., 102 Mass. 552; Walker v. Transp. Co., 3 Wall. 150; Express Co. v. Kountze, 8 Id. 342; McCormick v. Pennsylv. R.R. Co., 99 N. Y. 65; Hughes v. Sun Mut. Ins. Co., 100 Id. 58.

95 Id. 562. See Russell Manf. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Mullen v. St. John, 57 Id. 572; Gianna v. Second Avenue R.R. Co., 67 Id. 597. When in an action against a railroad company to recover damages for personal injuries sustained by the plaintiff while a passenger on the de-

¹ Pittsburgh, etc., R.R. Co. v. Thompson, 56 Ill. 138. See Denver, etc., R.R. Co. v. Conway, 8 Col. 1; Bellman v. N. Y. Cent., etc., Co., 49 Hun, 153.

² Edgerton v. N. Y. & Harlem R.R. Co., 39 N. Y. 227; Caldwell v. N. J. Steamboat Co., 47 Id. 291; Saybolt v. N. Y., Lake Erie & Western R.R. Co., 56 Ill. 138.

the company the burthen of proving that he was not intoxicated at the time, and used proper care.¹ In an action against a railroad company by a passenger for an injury caused by an accident, the court charged the jury as follows : " It is true that ordinarily in actions of this character the plaintiff is limited to compensation for his injury, and that nothing further can be given. If you find from the evidence that the conduct of the engineer on the morning of the 4th of November, 1879, or the conduct of the railroad company in the employment of a bridge-keeper who could neither read nor write, amounted to such a reckless indifference to human life as to constitute wilful and malicious misconduct, then you may be justified in giving exemplary damages. It is for you upon the evidence to say whether you will or not." Held error. It did not follow from such an inability of the bridge-keeper that he could not accurately discharge all the duties incident to his employment.² In an action against contractors of a railroad company for injuries received by the plaintiff while riding on a construction train employed in transporting materials for the road, and not adapted for passengers, it appeared that the plaintiff, who was a sheriff and deputy marshal, desiring to arrest a person on the line of the road, applied to the conductor for passage on the train, and requested that the train would stop at a place named until the arrest could be made ; that the plaintiff's wishes were granted, he paying fare ; and that he was injured by the running over of a steer which threw the train from the track. It was held that the defendants were not under the same obligations and responsibilities which attach to common carriers of passengers by railroad ; that all the plaintiff could exact from the defendants was the exercise of such care and skill in the management and running of the train as prudent and cautious

¹ Pennsylvania R.R. Co. v. Books, 57 Pa. St. 339.

² Brooks v. N. Y. & Greenwood Lake R.R. Co., 30 Hun, 47.

men, experienced in that business, are accustomed to use under similar circumstances, and if notwithstanding the exercise of such care and skill, the accident occurred, they were not liable.¹ In an action against a railroad company for injuries received while traveling on the road, it appeared that the plaintiff, having a loaded freight car, and having missed connection with the freight train, prevailed upon the agents of the company to attach his car to the passenger train, which was contrary to the rules and instructions of the company, he agreeing to "run all risks," and to attend to the brakes on his car. It was held that the company was responsible if the injury to the plaintiff was caused by negligence or want of ordinary care in the running of the train, without concurrent negligence on his part.² On the back of a railroad ticket issued to a drover in charge of stock, and addressed to the conductor of the passenger car attached to the stock train, was the following indorsement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the party using this ticket." It was held that such a release was no excuse for negligence on the part of the company resulting in the death of the drover.³ In *Wells v. N. Y. Cent. R.R. Co.*,⁴ it was decided that a contract between a railroad company and a gratuitous passenger by which the former is exempted from liability under any circumstances for the negligence of its agents, whether slight or gross, for any injury to the passenger, is valid. The words in the ticket, "whether of negligence of their agents or otherwise," were held to

¹ *Shoemaker v. Kingsbury*, 12 Wall. 369.

² *Lackawanna & Bloomsburg R.R. Co. v. Chenewith*, 52 Pa. St. 382.

³ *Pennsylvania R.R. Co. v. Henderson*, 51 Pa. St. 315.

⁴ 24 N. Y. 181, *SUTHERLAND*, J., dissenting. See *Perkins v. N.Y. Cent. R.R. Co.*, 24 N. Y. 197.

mean the negligence of the mere agents of the company, and not to extend to the acts of the directors or managers. In *Smith v. N. Y. Cent. R.R. Co.*,¹ a drover in charge of stock who paid no separate fare under a contract providing that persons riding free to take charge of stock, who paid no separate fare under a contract stipulating that "persons riding free to take charge of stock, do so at their own risk of personal injury from whatever cause," was held by a divided court not a gratuitous passenger. But in *Bissell v. N. Y. Cent. R.R. Co.*,² it was held that a common carrier might exonerate himself from liability to a drover under a contract such as was stated in the last case, for the negligence of its agents and servants.³

In an action against a railroad company to recover damages for alleged negligence on its part causing the death of a mail agent, it appeared that it was the custom for a superintendent of the government mail service to issue a monthly requisition upon the defendant for passes over its road for the use of the persons traveling in charge of the mails, and that a pass was issued and delivered to such superintendent for the use of the plaintiff's intestate and sent by the superintendent to the deceased. Upon the back of the pass was printed the following condition: "The person accepting this free pass assumes, in consideration therefor, all risk of accident, and expressly agrees that the New York, Lake Erie & Western Railroad Company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using this pass." It was held that the pass was a mere voucher issued for the convenience of the mail agent and the information of the employés of the defendant, and did not constitute a contract between the defendant and the per-

¹ 24 N. Y. 222.

² 25 N. Y. 442.

³ DENIO, C. J., and WRIGHT and SUTHERLAND, JJ., dissenting.

son using it, and that the condition attempted to be imposed by the company to the acceptance of the pass was illegal and ineffectual to shield it from the consequences of its wrongful acts.¹

When a corporation undertakes to carry passengers beyond its chartered line of railroad, it is liable for injury caused by the negligence of its agents, whether the accident occurred upon another railroad track or upon a common road used by it in the same business.² In an action against a railroad company for injuries received by the upsetting of a stage-coach, it appeared that the defendant owned and operated a road between T. and P.; that it hired a stage and driver at a daily compensation to carry passengers between the station S. and the village of the same name about one mile distant; that the stage started at the upper end of the village and picked up passengers as it proceeded down the street; that the driver was furnished with railroad tickets by the company and sold them to passengers, usually after their arrival at the station, but sometimes at the village; and that the plaintiff was injured while riding in the stage to the station for the purpose of taking the cars to T. It was held proper to submit it to

¹ Seybolt v. N. Y., Lake Erie & Western R.R. Co., 95 N. Y. 562; S. C. 31 Hun, 100. In an action against a railroad company for the wrongful killing of a mail agent, evidence that the deceased accepted a free ticket on the condition that he would take all risk of injury on the road, by which he relieved the company from liability for the negligence of its servants, is not admissible. The company, by its contract with the government, "received compensation for transporting both the mail and its custodians, and there would have been no consideration for the obligation entered into by the deceased to waive the damages, and in

addition to this it may be added that such a contract is against public policy. The duty which common carriers owe to all persons carried not to be guilty of negligent injury is one against the breach of which they may not protect themselves by private contract." Ill. Cent. R.R. Co. v. Crudup, 63 Miss. 291. See Rev. Sts. of U. S., ch. 10, tit. 46, secs. 3997, 4005.

² Hart v. Rensselaer & Saratoga R.R. Co., 8 N. Y. (4 Seld.) 37; Quimby v. Vanderbilt, 17 Id. 306; Bissell v. Mich. Southern & Northern Ind. R.R. Co., 22 Id. 258; Cary v. Cleveland & Toledo R.R. Co., 19 Wend. 534.

the jury as a question of fact, whether the plaintiff at the time he was injured was a passenger of the defendant, and a verdict having been rendered in his favor, the court refused to disturb it.¹

In an action against two railroad corporations to recover for injuries received by the plaintiff while a passenger in consequence of a collision, it appeared that the two companies were jointly concerned in carrying passengers and freight through a portion of the States of Illinois, Indiana, and Michigan, by three connected railroads, under a consolidated arrangement; that they undertook to convey the plaintiff from a point near Chicago eastward over the consolidated line of road, and that during the transit the plaintiff's leg was broken through the carelessness of the defendants. The defendants insisted that they had no right or power to consolidate their business in the manner stated, or to acquire the possession and use of a connecting

¹ *Buffett v. Troy & Boston R.R. Co.*, 40 N. Y. 168. JAMES, J., dissented on the ground: first, because the plaintiff at the time he was injured had not paid for his passage, the conventional relation of passenger and carrier never existed, and no contract, express or implied, was established; second, the employment of the stage was not authorized by defendant's charter, was not within its powers, and, therefore, the acts of its officers in making such contract was *ultra vires* and void; third, the corporation might avail itself of such invalidity as a defense. In an action against a railroad company for injuries received by the upsetting of a stage-coach under an alleged contract of the company to carry passengers from New Haven to Collinsville, it appeared that the defendant in fact only ran its cars to a point five miles short of Collinsville, the balance of the route being traversed by the stages of private owners; that one company received

nothing for the services, expenditures, or risks of the other, and there was no participation in the profits. The defendant had publicly advertised its time-table, together with the hours of departure of the stages, and the plaintiff's railroad ticket had on it the words "New Haven to Collinsville by stage from Farmington." It was held that although the ticket taken in connection with the payment of the money for the entire distance would furnish some evidence of a promise to transport the holder of the ticket over the entire line, yet when it was seen that the company had no connection with the stages, and that, for the convenience of the public, each party simply took the whole fare, the inference that a special contract was made was a mere presumption, and a verdict for the plaintiff was set aside as contrary to evidence. *Hood v. New York & New Haven R.R. Co.*, 22 Conn. 1, WAITE and HINMAN, JJ., dissenting.

road in Illinois, and that their business was not in judgment of law consolidated, but that all their acts and proceedings were in legal contemplation those of the natural persons who were engaged in promoting the same. It was held that the two companies were jointly liable for the injuries and the plaintiff entitled to recover.¹ The Baltimore and Ohio Railroad Company was incorporated by an act of the legislature of Maryland passed the 28th of February, 1827. On the 8th of the following March, the legislature of Virginia passed an act which, after reciting the Maryland act, declared that the same rights and privileges were granted to the company within the territory of Virginia, and that it should be subject to the same pains, penalties, and obligations as were imposed by the Maryland act. By an act of Maryland of the 22d of February, 1831, the company was authorized to construct a lateral road to the line of the District of Columbia. On the 2d of March, 1831, Congress passed an act which, after reciting in the preamble the original act of incorporation, provided that the company might extend its railroad into and within the District of Columbia; and then followed substantially the same provisions as were contained in the Virginia act. A supplemental act of Maryland provided that the stock issued by the company to complete the lateral road should form the capital upon which the net profits derived from the use of such road should be apportioned. H. bought at the office of the company in Washington a ticket made up of three coupons with which to go from there to Columbus, Ohio. On the first coupon was this memorandum: "Responsibility for safety of person or loss of baggage

¹ *Bissell v. Mich. South. & Northern Ind. R.R. Co.*, 22 N. Y. 258. A railroad company owes the same degree of care to the clerks and mail agents riding in the postal car in charge of the mails, as it does to passengers. *Nolton*

v. Western R.R. Co., 15 N. Y. 444; *Blair v. Erie R.R. Co.*, 66 Id. 313; *Seybolt v. N. Y., Lake Erie & Western R.R. Co.*, 95 Id. 562. See *Pennsylvania R.R. Co. v. Price*, 96 Pa. St. 256; *Davison v. Railroad Co.*, 11 Oregon, 136.

on each portion of the route is confined to the proprietors of that portion alone." H., while traveling on the railroad in Virginia, was severely injured by a collision, and he brought an action against the Baltimore and Ohio Railroad Company. It was held that neither the act of the legislature of Virginia, nor that of Congress, created a new corporation, but that those acts were licenses given to the Maryland corporation as such, which maintained its identity as before, with simply an enlargement of its sphere of operations.¹

§ 292. Duty of corporation to keep its works in a safe condition.—However lawful a business may be, and whether pursued by an individual or corporation, the law exacts of those who undertake it a careful regard for the rights and interests of others. It must not only be lawful in itself, but also lawfully pursued, to shield from responsibility. It cannot be accomplished safely to others without the exercise of a proper degree of care and skill; which means such care and skill as careful and prudent men, competent to the undertaking, exercise in their own affairs when the loss, if any happens, is to be borne by themselves.²

Corporations, like natural persons, are subject to remedial legislation, and, without express reservation by the legislature of power over them, they are liable to be restrained, limited, and controlled by such laws as the legislature may pass based upon principles of public safety to the public.³ When the act incorporating a city makes it

¹ *Balt. & Ohio R.R. Co. v. Harris*, 12 Wall. 65.

² *Dayton v. Pease*, 4 Ohio St. 80; *Thayer v. Boston*, 19 Pick. 511; *Bower v. New York*, 3 Barb. 254; *Brownlow v. Metrop. Board of Works*, 16 J. Scott N. S. 546; 111 Eng. C. L. 546; *Ruck v. Williams*, 3 H. & N. 308; *Proprs. of Southampton v. Local Board*, 8 Ell. & Bl. 801. A municipal corporation is responsible for the negligence or unskilfulness of its agents

and servants when employed in the construction of a work for the benefit of a city or town; also for the negligent acts of persons employed by it in making erections upon its real estate, though the relation of master and servant does not exist between such persons and the corporation. *New York v. Bailey*, 2 Denio, 433.

³ *Frederick v. Groshen*, 30 Md. 436; *Richmond, etc., R.R. Co. v. Richmond*, 26 Gratt. 83.

the duty of the city authorities to keep in repair the streets and highways within the city limits, an action will lie against the corporation in favor of a person who is injured in consequence of a tortious and negligent breach of the duty of keeping in repair a bridge within those limits.¹ The principle that those who have works under their control are bound to keep such works in proper repair, is applicable to public ports in possession of a city, as well as to canals, bridges, and other highways in the custody of individuals and private corporations. There is no reason or authority for any distinction ; and a municipal corporation is liable for special injury sustained by an individual in consequence of its neglect to keep a wharf in a safe condition. The right of action is not based on the city ordinances, nor on the ground that the wrong is committed by a neglect to enforce them ; but that the injury is a violation of the duty arising out of the control which the city has over the port, and from its receiving tolls from the vessels which come into it.²

It is the duty of a railroad company to keep its road and works and all portions of its track in such repair, and so watched and tended, as to insure the safety of those who may lawfully be upon it, whether passengers or servants, or others ; and if it fails to do so, it is responsible for the consequences. Under this rule it is liable for defects which it knew, or by reasonable care and diligence might have known.³ Where the plaintiff's intestate, who was a brakeman on the defendant's railroad train, was killed by the breaking down of the track, it was held proper for the jury to determine whether the accident and consequent injury

¹ Smoot v. Wetempka, 24 Ala. 112. Ill. 197; Gibson v. Pacific R.R. Co.,

² Pittsburg v. Grier, 22 Pa. St. 54. 46 Mo. 163; Harper v. Indianapolis &

³ Ryan v. Fowler, 24 N. Y. 410; St. Louis R.R. Co., 47 Id. 567; Broth-Noyes v. Smith, 28 Vt. 59; Hayden v. Cartter, 52 Id. 372; Susque-Smithfield Manf. Co., 29 Conn. 548; hanna, etc., Turnp. v. People, 15 Chicago, etc., R.R. Co. v. Sweet, 45 Wend. 267; Kane v. People, 3 Id. 363.

to the intestate were occasioned by the defendant's negligence in not making the road-bed reasonably safe for use by its employés.¹ In an action against a railroad company to recover damages for the loss of a leg while serving as brakeman on defendant's road, the petition alleged that the plaintiff was injured while in the discharge of his duties in coupling cars, without carelessness or negligence on his part, through the negligence, carelessness, and want of proper care and prudence of the defendant in the management of its railroad in this, that it permitted deep and dangerous holes to remain open in the ground and road-bed between its side track and the main track into which the plaintiff stepped, whereby he was thrown upon the track, run over, and crushed by the wheel of the car. It was further alleged that the existence of the hole into which the plaintiff stepped was not known to him, but that the hole was left by the defendant after it was notified of its existence, and knew, or ought to have known, that it was unsafe and dangerous to its employés; that, as a result of the injury, he twice suffered amputation, once between the ankle and knee, and afterward between the knee and the hip. The jury having found that the plaintiff did not contribute to the injury, or know that the hole was there, and that it was not so plainly visible that it was carelessness in him to overlook it, it was held that he was entitled to recover. The evidence tended to show that the hole had been dug by steamboat men, for the purpose of placing a post in it to which to tie their boats; that it had been there three or four days before the accident, and that another brakeman had seen it and complained of it to the section foreman. The court said, that although it was true in one sense that the section foreman, whose duty it was to superintend the track and keep it clear and safe, was a fellow-servant of the plaintiff, yet he represented the company, and his

negligence was the company's negligence in a matter in which it owed a duty and obligation to its servants.¹ In a case in which it was decided that a railroad company was liable for an injury to one of its servants, caused by a want of repair in the road-bed, the plaintiff was injured in coupling cars. In coming out from between the cars he stepped one foot into a hole on the side of the track, the train caught and crushed the other foot, and it became necessary to amputate his leg. The plaintiff testified that he had known of the existence of the hole for some time, and had complained of it to the repairer of the track. It was urged in the argument for the company that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that the track was kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow-servant. BIGELOW, C. J., in delivering the opinion, said : "This argument leaves out of sight the real ground on which the liability of the defendant rests. If the argument is well founded, then it would follow that as a corporation can only act by agents or servants, it would escape all responsibility for every species of injury caused by the defective machinery and apparatus or badly constructed tracks, or insufficient bridges, and other similar causes. So an individual could avail himself of a similar immunity if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil

¹ Lewis v. St. Louis & Iron Mt. R.R. Co., 59 Mo. 495.

this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty."¹

The carrier of passengers, especially in vehicles and conveyances propelled by steam, where the consequences of an accident from defective machinery are almost certainly fatal to human life, is bound to use every precaution which human skill, care, and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting improvements to secure additional protection. If a defect exists which might have been avoided or remedied by any means which science has made known and demonstrated to be useful and effective, the carrier should employ such means although not generally used.² Although the employés of a railroad company do not positively know that an engine is unsafe, yet if it is so in fact, and they receive such reports in relation to it as ought to put them on inquiry and to lead by the use of proper diligence to a knowledge of the facts, the company will be held to the same liability as if its agents had actual knowledge; and if the condition of a locomotive, in fact insecure, can be ascertained by the exercise of the highest diligence, the company will be responsible if it neglects to ascertain the truth.³

§ 293. Injury of employé from defective machinery.—A corporation is liable to an employé for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance.⁴ Accordingly, where machinery is permitted to get in an unsafe condition, and complaint is made by a servant or employé during the period it is out of repair, the master takes upon himself the risk, and is responsible to a servant

¹ Snow v. Housatonic R.R. Co., 8 Allen, 441.

² Caldwell v. N. J. Steamboat Co., 47 N. Y. 282.

³ Chicago & Alton R.R. Co. v. Shannon, 43 Ill. 338.

⁴ Fl like v. Albany R.R. Co., 53 N. Y. 549.

for any accident that may happen in consequence.¹ Although, as a rule, the servant of a corporation, who has been injured by the negligence, misfeasance, or misconduct of a fellow-servant, cannot maintain an action against the master for such injury, yet it is otherwise where the injury is caused by reason of improper and defective machinery or appliances used in the prosecution of the business, or where the servant by whose negligence or misconduct the injury was occasioned was not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant was attributable to the want of ordinary care on the part of the master. While it is true that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety.² Although the coupling of railroad cars is hazardous, requiring great care on the part of those who engage in it, yet it does not follow that, because of an accident to such an employé while performing his duty, the employer is liable simply because the

¹ Holmes v. Clark, 6 H. & N. 349; Keegan v. Western R.R. Co., 4 Selden, 175.

² Wright v. N. Y. Cent. R.R. Co., 25 N. Y. 565; Warner v. Erie R.R. Co., 39 Id. 471; Snow v. Housatonic R.R. Co., 8 Allen, 444; Gilman v. Eastern R.R. Corp., 10 Id. 233; Noyes v. Smith,

28 Vt. 63; Ill. Cent. R.R. Co. v. Jewell, 46 Ill. 99; McDermott v. Pacific R.R. Co., 30 Mo. 115; Roliback v. Pacific R.R. Co., 43 Id. 187; Gibson v. Pacific R.R. Co., 46 Id. 163; Harper v. Indianapolis & St. Louis R.R. Co., 47 Id. 567; S. C. 44 Id. 488; Hutchinson v. Railway Co., 5 W. H. & G. 352.

accident might have been prevented by some special device or precaution not in common use. In such cases the risk of injury is one of the hazards which the employé assumes when he engages in the service. Where there was no proof that the risk was extraordinary in its nature, it was held error to submit that question to the jury.¹

But while the master is not an insurer of the employé's safety, yet he must furnish him with machinery and appliances suitable to the use they are intended to be put; and he must not only furnish them originally, but must use ordinary care and diligence to see that they are kept in that condition. If a defect unknown to the servant exists, chargeable to the master's negligence in either of these respects, he is liable.² In an action founded on the alleged negligence of a railroad corporation in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as engineer upon its road, the following evidence was held sufficient to establish the company's liability: That the defendant, by its agents intrusted with that duty, did not exercise ordinary care and diligence in supplying and maintaining an engine safe to be used for motive power upon the road in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; that the plaintiff was in the exercise of ordinary care and diligence in the use of the engine; that he did not know, or have reasonable cause to believe, that the engine was unsafe at the time of the explosion; and that the injury was not in whole or in part caused by any violation of the terms of his contract of employment as expressed in the rules of the road. The question was not whether the officers of the company knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs; but whether the

¹ Northern Cent. R.R. Co. v. Husson,
101 Pa. St. 1.

² Hickman v. Missouri Pacific R.R.
Co., 2 Mo. App. 344.

corporation, in any part of its organization by any of its agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use. Agents who are charged with the duty of supplying safe machinery, are not in the true sense of the rule to be regarded as fellow-servants of those who are engaged in operating it, but have the master's duty. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require.¹ While an employé of a corporation takes the natural risk of his employment, including that which results from the negligence of his fellow-servants, the rule has no application if the corporation has at the same time disregarded its obligation to provide a suitable road-bed, engines, cars, or other necessary appointments of the railroad, so that the injury is not caused by the negligence of a fellow-servant, but is in part the result of the omission by the corporation of its duty.²

§ 294. Injury by co-employé.—An employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business; the general rule being that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment.³ In an action against a railroad company for a personal injury, it appeared that the plaintiff was employed to take care of the defendant's engines, and to do other work in and about the defendant's roundhouse, including

¹ *Ford v. Fitchburg R.R. Co.*, 110 Mass. 240.

² *Ellis v. N. Y., Lake Erie, etc., R.R. Co.*, 95 N. Y. 546.

³ *Sherman v. Rochester & Syracuse R.R. Co.*, 15 Barb. 574; *Coon v. Syracuse & Utica R.R. Co.*, 1 Seld. 492;

Priestly v. Fowler, 3 Mees. & Welsb. 1; *Murray v. South Carolina R.R. Co.*,

i McMullan, 385; *Farwell v. Boston & Worcester R.R. Co.*, 4 Metc. 49; *Randall v. Balt. & Ohio R.R. Co.*, 109 U. S. 478.

the duty of opening the doors of the roundhouse when the engines passed in or out, and to shut the doors afterward. At the time of the accident, the plaintiff and two other employés were endeavoring to shut these doors, which weighed several hundred pounds, and which it was difficult to do on account of an accumulation of snow and ice. They had succeeded in shutting one, and while trying to shut the other, one of the plaintiff's co-employés pried it up with an iron bar so high as to lift it from its hinges, and cause it to fall upon the plaintiff. It was held, reversing the judgment of the court below, not an operating of the road within a statute allowing employés of a railroad company to recover against the company for injuries occasioned by the negligence of co-employés where the wrongs were in any manner connected with the use and operation of the railroad.¹ Where it was sought to recover damages against a railroad company for the death of the plaintiff's intestate alleged to have been caused by the defendant's negligence, it appeared that the deceased was at the time of his death in the employ of the company as a foreman of its shop, the company agreeing to pay him a price fixed per hour while he was in the shop, and to transport him from his residence to the place where the work was to be done and back again upon its railroad without charge; and that at the time of the accident the deceased was in the defendant's car on his way to the shop. It was held that, as it was essential that the deceased should be in the car at the time and place of the accident to enable him to fulfil his contract of service, he was there as an employé, and the plaintiff could not recover.²

¹ Malone v. Burlington, etc., R.R. Co., 17 N. Y. 134; Gillshannon v. Stony Brook R.R. Corp., 10 Cush. 228; Seaver v. Boston & Me. R.R. Co., 14 Gray, 466; Tunney v. Midland R.R. Co., L. R. 1, C. P. 291. *Contra*, O'Donnell v. Allegheny Valley R.R. Co., 59 Pa. St. 239.

² Vick v. N. Y. Cent., etc., R.R. Co., 95 N. Y. 267. See Ross v. N. Y. Cent., etc., R.R. Co., 5 Hun, 488, aff'd 74 N. Y. 617; Russell v. Hudson River R.R.

The principle that a railroad company is not liable for an injury received by one servant from the negligence of another while both are acting in the common business of the company, does not apply where the servant injured was not at the time of the injury acting in the service of the company ; he being in such case substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant. It will not affect the question that the servant, when he was injured, was absent from his post of service without permission, if he was received on a train of the company without objection by the conductor who was intrusted with the duty of excluding all persons not lawfully entitled to be on the train ; nor that he was riding in the baggage car.¹

§ 295. Injury in case of contributory negligence.—An action cannot be maintained for the consequences of a negligent act where the party complaining has, by his own negligence, contributed to the misfortune. The mere want of ordinary care or caution would not, however, disentitle him to recover unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened ; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. A swing bridge over a canal crossing a public highway when turned back for the passage of a barge along the canal left a gap on the side of the road without any fence toward the water. A., being upon the bridge while it was in this position, and the spot being dark, incautiously stepped back, and falling into the water was drowned. In an action by his widow and administratrix against the canal company, under Lord Campbell's act, the jury were instructed that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part

¹ Washburn v. Nashville, etc., R.R. Co., 3 Head. Tenn. 638.

of the deceased, the plaintiff was entitled to recover; but that if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendant. The direction was held correct, notwithstanding the bridge was not secured as it should have been.¹ A railroad or steamboat company, by the departure and arrival of its conveyances, gives an invitation to all who desire to approach its boats or cars to pass over its wharf or platform. One accustomed so to pass cannot be deemed a trespasser in repeating his act after a new station or landing has been adopted and the cars or boats have ceased to use the old one. To deprive a passer of such right so as to make him in fault and prevent his recovery for an injury sustained in consequence of the place being in a bad condition, notice must have been given of its changed character, and that the rights of passers are terminated.²

It has been held, however, that a railroad company is not bound to exercise ordinary care and skill in the erection, structure, and maintenance of its station-houses as to persons who enter the same not on any business with the company or its agents, nor on any business connected with the operation of its road, but are there without objection on the part of the company, and therefore by its mere sufferance or permission.³ In an action against a railroad company it appeared that the plaintiff, a boy five or six years of age, was injured while loitering upon the edge of the platform looking at a moving train; that an elder brother had previously told him to come back from where he was standing, which he refused to do; and that a passing car, moving at a rate not exceeding three or four miles an hour, with an iron step

¹ Witherly v. Regent's Canal Co., 12 Johns. 90; Ill. Cent. R.R. Co. v. J. Scott N. S. 2; 104 Eng. C. L. 1. See Downey, 18 Ill. 259.

Tuff v. Warman, 2 Id. 740; 89 Eng. C. L. 740; 94 Eng. C. L. 573; Town-² Railroad Co. v. Hanning, 15 Wall. 649. " Pittsburg, etc., R.R. Co. v. Bing-
send v. Susquehanna Turnp. Co., 6 ham, 29 Ohio St. 364.

projecting from the side of the car, struck and pulled him from the platform under the wheels so that he was run over. It was held that he was not entitled to recover. The court said : "There is no question of contributory negligence involved in the inquiry or essential to its consideration. If the defendant did not owe the duty of protection against the injury suffered in the particular case, the omission to furnish such protection is not negligence, and there is no liability on that ground. The plaintiff had no right to place himself in the position in which it was possible for him to be injured in such a manner, and the defendant was not bound to take precaution against such injury. It is not denied that this would be true if the plaintiff were an adult ; how then can it be otherwise than true as to a child ? The absence of duty is precisely the same in either case, and the consequent absence of liability must be the same in both. It is quite true that young children can recover for injuries in circumstances in which adults cannot. But even children cannot recover unless there is negligence, and there can be no negligence without a breach of duty."¹ In an action against a railroad company for injury caused by a turn-table situated on uninclosed ground, it appeared that the plaintiff, a boy six years of age, started without the knowledge of his parents with one or two other boys to go to the defendant's depot, with no definite purpose in view ; that when they reached the depot some of them proposed that they should go to the turn-table, about a quarter of a mile distant, to play, which they did by following the railroad track ; that two of the boys commenced revolving the turn-table, and the plaintiff, in attempting to get upon it, got his foot caught between the end of the rail on the turn-table as it was revolving and the end of the rail on the main track, and his foot was cut, crushed, and permanently injured. The ground of action was that the turn-table being

¹ Balt. & Ohio R.R. Co. v. Schwindling, 101 Pa. St. 258.

dangerous when unlocked or unguarded in a place much resorted to by the public, and where children were in the habit of playing, it was the duty of the company to keep it locked or fastened so that it could not be turned by children, or to keep it guarded so as to prevent injuries such as befel the plaintiff. A verdict having been found for the plaintiff, it was held, on writ of error, that the company was liable, though the court remarked that if the action had been brought by an adult who meddled with and set in motion the turn-table, it would have had no hesitation in saying that the action could not have been maintained.¹ A railroad company had left on a branch track four empty cars and one loaded one. The four cars, the brakes of which were not set or secured, were started by a violent wind, and ran against the loaded car, propelling it forward, and causing it to run over and kill the plaintiff's intestate, who was upon the track. The place where the branch track was constructed was open, and was customarily used by the people in the vicinity without any objection of the company. An instruction of the jury that it was the duty of the company to set the brakes, and, if it left the cars without doing so or otherwise securing them, it was a violation of duty on its part, was held erroneous. It was said in the opinion of the Court of Appeals that no relation existed between the company and the deceased creating any particular duty, and that the company "had the same unqualified right which every owner of property has to do with his own as he pleases, and keep it and use it where and as he pleases on his own ground up to the point when such use becomes a nuisance."² The plaintiff, while walking on a railroad track, looked back several times, but did not see a train approaching him, and heard no signals, although he thought he heard the train come to

¹ Stout v. Sioux City & Pacific R.R. Co., 2 Dillon, 294. See Baldwin v. Carella, 7 Exch. 325; Jamison v. Ill. Cent. R.R. Co., 63 Miss. 33.

² Nicholson v. Erie R.R. Co., 41 N.Y. 525, HUNT and FOSTER, JJ., dissenting. See Gillis v. Pa. R.R. Co., 59 Pa. St. 129.

the depot, which he had just left. He could see back nearly a quarter of a mile. It was a passenger train running rapidly and going in the direction of the plaintiff; but he did not observe it until it struck him, breaking his leg. The testimony tended to show that the whistle was blown and the bell rung one hundred and fifty yards from the plaintiff, and that efforts were made to stop the train. It was held that the plaintiff was not entitled to recover, even if there was negligence on the part of the company.¹

§ 296. Damage done by contractor.—As a rule, an employer is not liable for the negligent or unskilful conduct of a contractor, or of any one employed by him while executing an independent employment. A principal selects a servant or agent with a view to his skill and care, and not only retains the control over all of his operations, but also has the power to dismiss him at any time for misconduct. A contractor assumes this position, leaving the employer no control over the work or the person by whom it is executed, but simply the right to require the thing produced or the result attained to be such as the contract has provided for. But although the relation between the parties be that of employer and contractor, yet if the employer retains the power to superintend the work and direct it to be done in such manner as he sees fit, it becomes his duty to see that it is done in a careful and skilful manner, and if he does not do this he is liable for injuries third persons may thereby sustain.² In an action against a railroad company for injury to the plaintiff's

¹ *Terre Haute, etc., R.R. Co. v. Graham*, 46 Ind. 239.

² *Knight v. Fox*, 5 Exch. 721; *Reedie v. London & Northwestern R.R. Co.*, 4 Id. 256; *Ellis v. Sheffield Gas Consumers' Co.*, 2 Ell. & Bl. 767; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. same*, Ib. 163. Where in an action against a railroad company for the injury of the plaintiff's dwelling-house

caused by fragments of rock thrown against it by a contractor for the construction of the railroad in blasting, the evidence tended to prove the concurrence of the company in all the acts performed by the contractor, it was held that the court erred in nonsuiting the plaintiff. *Carman v. Steubenville & Ind. R.R. Co.*, 4 Ohio St. 399. See *Railroad Co. v. Hanning*, 15 Wall. 649.

property, caused by blasting rocks for the construction of the railroad, it appeared that the company let the contract to build the entire road to one D., who sub-contracted the whole or a portion of the work, and the blasting complained of was done by men employed by the sub-contractor, over whom the company had no control. It was held that the person for whom the men were working, and by whom they were employed, and not the railroad company, was liable for the damage done to the plaintiff.¹

If ledges of rock of considerable size are upon land taken for the track of a railroad at the time of the appraisal of damages, it will naturally be in the minds of the appraisers that the stone must be removed in the course of constructing the road; and, being of a character only removable ordinarily by blasting, it must occur to them that fragments more or less must be thrown upon the adjoining premises, and that it will be necessary to go upon the land to remove such fragments. It will be the duty of the company to conduct this blasting in such a way as to do the least possible injury; and when, by such operation, stones are thrown beyond the limits of the land taken by the road, to remove them as soon as it can reasonably be done, and the fact that such fragments are imbedded in the land will make no difference. For damages of this nature no action would lie if there was no want of ordinary care on the part of the com-

¹ McCafferty v. Spuyten Duyvil & Port Morris R.R. Co., 61 N. Y. 178; s. c. 48 How. Pr. 44. DWIGHT, C., said: "The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium, facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made the choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or

want of care of the person employed. But neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." See Hobbit v. London and Northwestern R.R. Co., 4 Exch. 255; Cunningham v. International R.R. Co., 51 Texas, 503; Meyer v. Midland Pacific R.R. Co., 2 Neb. 1319; Kansas Cent. R.R. Co. v. Fitzsimmons, 18 Kansas, 34.

pany; and in case of the absence of such care, whether in conducting the operations of construction, or in not relieving a party from necessary temporary loss or inconvenience, the action should be case, and not trespass.¹

§ 297. Injury by receiver.—When a complaint is made against a receiver for an injury sustained by reason of negligence in the exercise of his official duties, the court may either itself take cognizance of the complaint and administer justice between the parties, or may allow the person aggrieved to bring his action for the alleged injury.² It has been held in Ohio that a receiver operating a railroad is answerable in his official capacity for an injury to his servant sustained while in his employment by reason of the negligence of the receiver or the negligence of his agents in a position superior to that of the servant. In that State, among the powers conferred upon a receiver by statute, is that of bringing and defending suits in his own name as receiver. His status in this respect is like that of an administrator, and is analogous to that of a class of *quasi* corporations which are authorized to conduct legal proceedings in the name of their officers. Whatever he acquires by suit belongs to him officially, and satisfaction of judgments against him can be obtained only from the fund in his hands as receiver as directed by the court appointing him. The reasons for holding him answerable in his official capacity are stronger than those for holding him personally liable. For if he were not in default himself, there would be a hardship in making him personally liable for the negligence of those he employed, not for his own benefit or profit, but for that of the fund he controlled; and, on the other hand, those having grievances growing out of his official business might often be practically reme-
diless if they were left to the personal responsibility of the

¹ Sabin v. Vt. Cent. R.R. Co., 25 Vt. 363. ² Parker v. Browning, 8 Paige Ch. 388.

receiver and were not permitted to pursue him in his official capacity and obtain redress from the fund in his hands as receiver. Nor would a recovery against him and satisfaction out of the fund properly applicable to that purpose work a greater hardship to the creditors and stockholders of the corporation than that always sustained by them when the corporation itself is made liable.¹ It was said by the court in Vermont, in an action against the trustees of the bondholders of a railroad, that "it is well settled in practice and by repeated decisions that the lessees of railroads are liable to the same extent as the lessors would have been while they continue to operate the road. And we can see no reason why the defendants are not liable to the same extent as the company would have been and on similar grounds to those upon which lessees or any others exercising the franchise of the company for the time must be; that is, they are the ostensible parties who appear to the public to be exercising the franchise of the company. It would be perplexing in the extreme to require strangers, suffering injury through the negligence of operatives under the defendant's control, to look beyond the party exercising such control whether of contract or tort."² It had been previously held in the same State to be no defense to an action at law against receivers for a breach of duty or obligation arising out of the business intrusted to them in that relation that the defendants were running and managing a railroad as receivers under an appointment of a court of equity.³ It was decided in Massachusetts that receivers operating a railroad under the appointment of a court of equity in another State who acted as common carriers and were there liable to actions at law, might be sued as common

¹ Meara v. Holbrook, 20 Ohio St. Hicks v. International, etc., R.R. Co., 137. See Henderson v. Walker, 56 42 Texas, 38. Ga. 481. ³ See Blumenthal v. Brainard, 38 Vt.

² Sprague v. Smith, 29 Vt. 421. See 402.

carriers in Massachusetts.¹ It was held in New York that the receiver of an insolvent railroad company who was operating the railroad was not liable for the alleged negligent killing of a passenger where there was no claim of his personal negligence, but only negligence of his employés.²

§ 298. Liability of quasi corporations for neglect of duty.

—There is a conflict in the decisions as to the liability of a county for damages to individuals in consequence of the non-repair of bridges. Some of the cases discriminate between counties and cities; others hold that neither counties nor cities are liable for such neglect in the absence of a statute making them so; while others maintain that a county is liable in such case without any statute providing for the liability. In Iowa a county has been held liable. In that State the Supreme Court said: “The question recurs, To whom must the plaintiff look for indemnity? We think to the county. We think so because the county is charged with the duty of building and maintaining bridges, and even of repairing them when the requisite expenditure for doing so is large. This duty involves a corresponding obligation or liability to pay damages resulting from a neglect of the same. This rule is not only authorized and sanctioned by the analogies, but by the policy of the law which requires that the traveling public should have some security for a safe passage over the bridges and highways of the country.”³ In a case in Maryland, the court said: “The duties imposed by law upon the county commissioners being defined in the most comprehensive terms, and the law having supplied them with ample means and armed them with coercive power sufficient to meet and sustain their liabilities, they are responsible for special damage

¹ Paige v. Smith, 99 Mass. 395.

Iowa, 181. And see to the same ef-

² Cardot v. Barney, 63 N. Y. 281,

fect, Brown v. Jefferson County, 16 Id.

CHURCH, Ch. J., dissenting.

339; Kendall v. Lucas County, 26 Id.

³ Wilson v. Jefferson County, 13

395; Taylor v. Davis County, 40 Id. 295.

resulting from the non-repair of the public roads by their officers, the road supervisors."¹

In New Hampshire it was held that towns were liable at common law for the neglect of their duty to keep highways within their limits in repair. The court said: "We are inclined, therefore, to the opinion that the general maxim of the common law, that he who is specially damaged by the breach of a duty on the part of another shall have his remedy by action, is properly applicable to the case of one who has received an injury through the neglect of a town to repair its roads."² In Pennsylvania it was held that an action on the case would lie against a town to recover damages for an injury sustained by reason of the negligence of the supervisors to keep the road in repair.³ In a subsequent case in the same State, BLACK, C. J., employed the following language: "Every highway or thoroughfare which the public has a right to use must be kept by somebody in such order that it can be safely used, and, if any serious injury happens to an individual in consequence of its bad condition, those who are bound to repair must answer in damages. I have cited these several cases to show that a party bound to repair, whether it be an individual, a private corporation, a township, district, or city, must perform the duty or pay in an action on the case for all injuries to persons and property which may be caused by the omission."⁴

In Indiana the obligation imposed by law upon the board of county commissioners to cause all bridges in the county to be kept in repair, with power to provide means to discharge the obligation, carries with it a corresponding right in every one having occasion in the usual course of travel to use the bridges to have the obligation fulfilled and

¹ County Commrs. v. Duckett, 20 ² Dean v. New Milford, 5 Watts & Md. 468; S. P. County Commrs. v. Serg. 455.

Gibson, 36 Id. 229.

³ Wheeler v. Troy, 20 N. H. 77.

⁴ Erie City v. Schwingle, 22 Pa. St. 384.

the bridges kept in repair ; and where the board negligently suffers such bridge to be out of repair, whereby a person in the ordinary use of it is injured in person or property without his fault, he may maintain an action against the board.¹ In a case in Ohio the court discriminated between a county and a municipal corporation, holding that the former would not be liable, while the latter might under like circumstances, as follows : " It is freely admitted that if counties are in all material respects like municipal corporations proper, and may be fairly classed with them, then this action ought to be maintained. But how is the fact ? This question is vital, and on its solution the case must depend. As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a State, created by the sovereign power of the State of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces ; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people ; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."²

¹ House v. Board of Commrs., 60 Ind. 580.

² Commrs. of Hamilton County v. Mighels, 7 Ohio St. 109. The Supreme

It was said by the Supreme Court of Massachusetts that the rule that a private action cannot be maintained against a *quasi* corporation for neglect of corporate duty unless the action be given by statute, is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent express or implied, or a special authority is conferred on it at its request; that in the latter case, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents.¹ It is of course the same in the case of a county; and it will make no difference in principle whether the special duty is imposed with its consent express or im-

Court of Indiana, in *House v. Board of Commrs.*, *supra*, commented upon the above thus: "It seems to us that the method of the creation of the corporation cannot be decisive of the question of liability, one way or the other. A county is created by the sovereign power of the State. A city cannot be created otherwise than by the sovereign power of the State. This sovereign power may be exercised, to be sure, in the passage of general laws under which cities may be voluntarily organized. But the liability of the corporation for the failure to perform a duty imposed by law cannot be made to depend upon the question whether it was organized by the act and consent of the people inhabiting the territory in pursuance of law, or was superimposed by law without such consent. The people in each class of corporations elect their officers, for whose neglect of duty they

may be liable through the medium of the corporate organization. Then, as to the objects and purposes of these organizations, it may be observed that the matter of keeping the streets of a city in repair is a matter of general State interest and policy, not affecting the people of the locality alone. No substantial difference is perceived between the duty of a county to keep the bridges therein in repair, and the duty of a city to keep its streets in repair, so far as the general policy is concerned. They are both matters of public interest, and controlled by the general policy of the State. Or, to state the proposition conversely, the matter of keeping the bridges of a county in repair is as local in its character as the matter of keeping the streets of a city in repair."

¹ *Bigelow v. Randolph*, 14 Gray, 541, per METCALF, J.

plied, or whether it voluntarily assumes the performance of that which, if imposed by the legislature, and assented to by the county, would have become a special duty. A similar view of the question has been taken in Illinois and Missouri.¹

In an early case in England, in which it was held that an action could not be maintained by an individual against a county for an injury sustained in consequence of a county bridge being out of repair, ASHURST, J., said: "It is a strong presumption that that which never has been done, cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. It has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is bet-

¹ Symonds v. Supervisors, etc., 71 Ill. 355; Hannon v. County of St. Louis, 62 Mo. 3113. See Scales v. Chattoochee, 41 Ga. 225; Wehn v. Commrs. of Gage County, 5 Nebraska, 494; Barbour County v. Horn, 48 Ala. 649; Brabham v. Supervisors, etc., 54 Miss. 363; Bray v. Wallingford, 20 Conn. 416; Hedges v. Madison, 1 Gilman, 567. Although where a corporate body, whether of a municipal or private character, owes a specific duty to an individual, an action will lie for a breach or neglect of the duty, whenever such breach or neglect has occasioned him an injury; yet, if a corporation owe a duty to the public, and neglect to perform it, notwithstanding all persons comprising the public are thereby injured, they have no private remedy at common law. The board of chosen freeholders in New Jersey is a corporation created by statute to execute all of

the legal purposes, objects, business, and affairs of the county. If, through the neglect of this board, a court-house, being old and out of repair, should give way and break a man's limbs, no action could be maintained by him against the county. The liability of toll-bridge, railroad, and turnpike companies to respond in damages to individuals rests upon different principles. Though they are corporations of a public character, and their roads and bridges are public highways, and though they owe certain duties to the public, for the neglect of which they may be indicted, yet, as between them and individuals who travel on their roads and bridges, they are *quasi* common carriers; they receive toll or compensation, and are therefore bound to furnish passengers with safe roads and bridges. Freeholders of Sussex Co. v. Strader, 3 Harr. N. J. 108, per HORNBLOWER, J.

ter that an individual should sustain an injury than that the public should suffer inconvenience. Now, if this action could be sustained, the public would suffer a great inconvenience; for, if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for, if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However, there is no foundation on which this action can be supported, and if it had been intended, the legislature would have interfered and given a remedy.”¹

§ 299. **Injury of personal property.**—Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing.² If a bank be accustomed to take special deposits, and this is known and acquiesced in by the directors, and property is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter.³ The owner of a chattel, as for instance a barge, may maintain an action against a corporation to recover damages for a permanent injury done to it by the negligence of the defendant’s servants while it was out on hire to a third person.⁴ The reception of live stock in the pens of a railroad company for transportation is equivalent to an obligation to forward them without unnecessary delay. If the government monopolizes the road, the company should abdicate its functions as a common carrier for the public at large. Its station agent is presumed to be acquainted with the condition of its rolling stock, and the ability of the company to forward freight received in a reasonable time,

¹ Russell v. Men of Devon, 2 Term, 667. See Mackinnon v. Penson, 25 Eng. L. & Eq. 457.

² Foster v. Essex Bank, 17 Mass. 479.

³ Nat. Bank v. Graham, 100 U. S. 699. ⁴ Mears v. London & Southwestern R.R. Co., 11 J. Scott, 850; 103 Eng.

barring inevitable accidents from obstructions to the road by storms, etc. The company is also supposed to be acquainted with the prior claims of the government, and it is its duty as a common carrier to provide for the accommodation also of private citizens.¹ An agreement or release relieved a railroad company from all responsibility for any injury to person or property in the transportation of live stock. At the trial of an action against the company for damage sustained in such transportation, the judge charged the jury that the carrier was bound, notwithstanding such a contract, to use ordinary diligence, such as a man of common prudence usually employs in his own concerns; that if he failed in this and loss ensued therefrom he was liable; that the company holding itself out as a common carrier, and professing to have a railway, cars, and facilities for the transportation of live stock, was bound, even after the plaintiff had signed the release, by the rules of ordinary diligence and care; that the effect of the contract was to take away the insurance against all risks, and to abridge the common law liability, but not to excuse for the want of ordinary care in the execution of the duty voluntarily assumed. LOWRIE, C. J., in delivering the opinion of the appellate court, said: "A contract limiting their liability as carriers does not relieve them from ordinary care in the performance of their duty. The most it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable even by the highest care, and to require that negligence be actually proved against them."²

¹ Pruitt v. Han. & St. Jo. R.R. Co., 62 Mo. 527; Denning v. Grand Trunk R.R. Co., 48 N. H. 455.

² Goldey v. Pa. R.R. Co., 32 Pa. St. 242. See Powell v. Pa. R.R. Co., Ib. 414; 23 Id. 526. A railroad company is not obliged to employ for the trans-

portation of live stock the safest and best approved motive power, with the best appliances in use; but only suitable, safe, and sufficient cars, motive power, and appliances. Ill. Cent. R.R. Co. v. Haynes, 63 Miss. 485.

§ 300. **Wilful acts of agent.**—For the acts of an agent within the general scope of his employment while engaged in the principal's business and done with a view to the furtherance of that business and the principal's interest, the latter will be responsible whether the act be done negligently, wantonly, or even wilfully. If the agent misconducts himself in the course of his employment, his acts are the acts of the principal, who must answer for them. The intimations in several decisions that for the wilful acts of the agent the principal is not responsible, are subject to the qualification that the acts designated "wilful" are not done in the course of the employment, and were not such as the agent intended and believed to be for the interest of the principal. If an agent goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the principal is not responsible. So that the inquiry is whether the wrongful act is in the course of the employment or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of principal and agent does not exist.¹

When authority is conferred to act for another without special limitation, it carries with it by implication authority to do all things necessary to its execution; and when it in-

¹ *Mott v. Consumers' Ice Co.*, 73 N.Y. 543. A private corporation is liable for the acts of its agents within the scope of their authority in the same way, and it would appear in the same form, as an individual. "A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service; the maxims applicable to such cases being *respondeat superior*, and *qui facit per alium, facit per se*. This rule, with some few ex-

ceptions, is of universal application. Whether the act of the servant be one of omission or commission, whether negligent, fraudulent, or deceitful, or even if it be an act of positive malfeasance or misconduct, if it be done in the course of his employment, his master is responsible for it *civiliter* to third persons. Actions against railway and steam packet companies also necessarily involve similar principles, as such companies can only act through the instrumentality of servants." Smith on Master and Servant, 2d Ed. pp. 183; 187.

volves the exercise of the discretion of the agent, or the use of force toward or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the principal, notwithstanding the agent departs from the private instructions of the principal, provided he is engaged at the time in doing his principal's business, and is acting within the general scope of his employment. A principal who puts his agent in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the agent, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.¹

The true rule seems to be, that when the agent acting in the capacity bestowed on him by the corporation, and in the discharge of some duty or employment directed by the employer, or incidental to his situation, does an act that causes damage to an individual, the body corporate is responsible; but where the agent does any act of his own free will without reference to his functions as a corporate agent, then the corporation is not responsible.² If the

¹ Rounds v. Del., Lack, & Western R.R. Co., 64 N. Y. 129; Stewart v. Brooklyn, etc., R.R. Co., 90 Id. 588; Halfrich v. Williams, 84 Ind. 53.

² Etting v. Commercial Bank, 7 Robinson La. 459; Lee v. Village of Sandy Hill, 40 N. Y. 442; Davis v. Bemis, Ib. 453, *note*; Henderson v. Railroad Co., 17 Texas, 560; Indianapolis, etc., R.R. Co. v. Anthony, 43 Ind. 183; Evansville, etc., R.R. Co. v. Baum, 26 Id. 70; Jeffersonville, etc., R.R. Co. v. Baum, 38 Id. 116; Craker v. Chicago, etc., R.R. Co., 36 Wis. 657; Ramsden v. Boston & Albany

R.R. Co., 104 Mass. 117; O'Brien v. Boston & Worcester R.R. Co., 15 Gray, 20; Howe v. Newmarch, 12 Allen, 49; Hawes v. Knowles, 114 Mass. 518; Fishkill Savings Inst. v. Nat. Bank, 80 N. Y. 162; Toledo, Wabash & Western R.R. Co. v. Harrison, 47 Ill. 298; Chicago, etc., R.R. Co. v. Dickson, 63 Id. 151; Weed v. Panama R.R. Co., 17 N. Y. 362. Where, after a bank had, for a valuable consideration, assigned a judgment, its president satisfied it, it was held that the bank was liable to its assignee; that if the satisfaction piece was given on payment of

master, when sued for an injury resulting from the tortious act of his servant while apparently executing his orders, claims exemption upon the ground that the servant was in fact pursuing his own purposes without reference to his master's business, and was acting maliciously and wilfully, it must ordinarily be left to the jury to determine this issue upon a consideration of all the facts and circumstances proved.¹ Where a corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the money or goods of the corporation; and before it can be made liable for such an act, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation.² In *Mali v. Lord*,³ the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant. It was held that authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he

the judgment, the money might be recovered by the assignee in an action for money had and received, and, if without payment, and the assignee was prejudiced thereby, he was entitled to recover from the bank the damages sustained. *Booth v. Farmers' & Mechanics' Nat. Bank*, 50 N. Y. 396.

¹ *Rounds v. Del., Lack. & Western R.R. Co.*, *supra*. See *Jackson v. Second Avenue R.R. Co.*, 47 N. Y. 274.

² *Carter v. Howe Machine Co.*, 51 Md. 290.

³ 39 N. Y. 381.

assumed to do what the master could not have done himself. In an action to recover money alleged to have been wrongfully appropriated by an officer of a bank, it appeared that the defendant was appointed and accepted the position of cashier upon the agreement that he would discharge its duties without compensation other than office, safe, and desk room, for his private business; that notwithstanding such agreement, he appropriated funds of the bank as compensation; that contrary to the rules of the bank known to him, which forbade interest on demand certificates, he caused to be issued to himself demand certificates drawing interest, and took from the funds of the bank interest on such certificates, and sold bonds belonging to the bank to himself for less than they were worth. It was held that, although these transactions were duly entered on the general books of the bank, it could not be conclusively presumed that the officers and directors had knowledge of, and acquiesced in or ratified them.¹

It is not a defense to a suit against the directors of a corporation for the infringement of a patent, that the acts were done, contrary to orders, by workmen employed by the directors. "Those who have control of the working are responsible for the acts of their subordinates, and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person. That must, of course, be avoided, whether orders to that effect are given or not; but the directors were bound to

¹ First Nat. Bank v. Drake, 29 Kansas, 311; 44 Am. R. 646. In this case the court remarked that while it could not be said as a matter of law that the directors were conclusively presumed to know the general business and condition of the bank as shown by the entries on its books so as to ratify the action of the cashier in fixing his own salary, and in taking the funds of the

bank in payment of it, yet a question might be presented for the jury to determine whether, independently of any proofs of actual knowledge, the action of the cashier had not been so open and long continued and under such circumstances, that it might be inferred as matter of fact that the directors assented to the payment of such salary.

take care that their orders were obeyed, and if there was a violation of them, whether openly or secretly, they are liable for the consequences.”¹

The plaintiff, a girl nine years of age, was walking with several other girls upon a bridge about seven o'clock in the evening, when one of the defendant's horse-cars came along very slowly, and the driver beckoned the girls to get on. They thereupon got on the front platform, and the driver immediately struck his horses, when, by reason of their suddenly starting, the plaintiff lost her balance, and fell so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car, unless such authority was implied from the fact of his employment as driver. The court said : “The driver of a horse-car is an agent of the corporation, having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation of the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is

¹ *Betts v. De Vitre*, L. R. 3, Ch. 441, per SHELMSFORD, L. C. See *Reg. v. Stephens*, 1 Q. B. 702. A railroad company incorporated in Pennsylvania was authorized to construct a railroad from York, in that State, to the Maryland line. Its entire capital was subscribed for and held by a Maryland railroad company, and their joint capital vested in a continuous line to Baltimore. The management of the company was committed to the Maryland company, which appointed the officers and agents, and supplied the rolling stock. The president and secretary of the two companies were the same, and the directors of the Pennsylvania corporation were selected by the Maryland company. It was held that the Pennsylvania company could not evade its obligations by such a transfer of its rights and powers, and that it was liable for the infringement of a patent used upon the road. *York & Maryland R.R. Co. v. Winans*, 17 How. 30. See *Hutchinson v. Western & Atlantic R.R. Co.*, 6 Heisk. Tenn. 634.

immaterial that the driver was acting contrary to his instructions.”¹

Although the injury was inflicted by the agent of his own malice, yet if the act was authorized by the rules and regulations of the corporation, it will be liable.² In an action against an omnibus company for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights by causing its vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway, the declaration alleging various grievances of that general character, the court said: “We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons we are of opinion that the plaintiff is entitled to judgment.”³

Where an agent is at liberty from employment, and pur-

¹ Wilton v. Middlesex R.R. Co., 107 Mass. 108. See Flower v. Pa. R.R. Co., 69 Pa. St. 210; Snyder v. Han. & St. Jo. R.R. Co., 60 Mo. 413. The directors of a turnpike road corporation prescribed in its by-laws the form of certificates to be given for its stock, which were to be under the corporate seal and signed by the president and treasurer. M., the treasurer of the corporation, pledged as collateral two spurious certificates of stock drawn and signed in the form prescribed in the by-laws for a loan of money, the lender acting in good faith and in ignorance of the fraud. It was held that the lender was entitled to recover from the corporation damages for the negligent and fraudulent acts of its president and treasurer in issuing the spurious cer-

tificates. Titus v. Gt. Western Turnpike Co., 61 N. Y. 237.

² Brokaw v. N. J. R. & Transp. Co., 32 N. J. 328. See Phila. & Reading R.R. Co. v. Derby, 14 How. 486; Vanderbilt v. Richmond Turnp. Co., 2 N. Y. 479; De Camp v. Miss. & Mo. R.R. Co., 12 Iowa, 348; Turner v. North Beach, etc., R.R. Co., 34 Cal. 594; Wade v. Thayer, 40 Id. 578; Mendelsohn v. Anaheim Lighter Co., Ib. 657; Childs v. Bank of Missouri, 17 Mo. 213; State v. Gt. Works Milling, etc., 20 Me. 43.

³ Green v. London Genl. Omnibus Co., 7 J. Scott N. S. 290; 97 Eng. C. L. 288. See Yarborough v. Bank of England, 16 East. 6; Whitfield v. Southeastern R.R. Co., 1 Ell. Bl. & E. 115; 96 Eng. C. L. 113.

suing his own ends exclusively, the principal is not liable, although the injury could not have been committed without facilities afforded to the agent by his relations to his principal. A cartman, having finished the business of the day, returned to his employer's shop with the horse and cart, and obtained the key of the stable, which was close at hand, but, instead of going there at once and putting up the horse, as it was his duty to do, he, without his master's knowledge or consent, drove a fellow-workman to Euston Square, and on his way ran over and injured the plaintiff and his wife. It was held by all of the judges that inasmuch as the cartman was not at the time of the accident engaged in the business of his master, the latter was not responsible for his act.¹ The master was held not liable where the servant in driving his master's wagon along the highway whipped his horses while the plaintiff's son, a young lad, was standing between the front and back wheels attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over, and injured. The servant was cautioned by a by-stander that if he did not stop he would kill the boy. The evidence tended to show that the servant whipped the horses with a wilful design to throw the boy off. The act of the servant was so imminently dangerous, it might reasonably be inferred that he designed the injury which resulted from it.²

Parties cannot contract that they may with impunity be guilty of wilful misconduct, or of that degree of recklessness which is its equivalent. "There is some difficulty in applying these principles to railroad companies on account of the artificial nature of corporations. As they can only

¹ *Mitchell v. Crassweller*, 13 Com. B. 237. For a similar case, see *Sheridan v. Charlck*, 4 Daly, 338.

² *Wright v. Wilcox*, 19 Wend. 343. In *Vanderbilt v. Richmond Turnpike*

Co., 2 Comst. 479, where the master of the defendant's boat intentionally ran into the boat of the plaintiff, it was held a wilful trespass of the master for which the defendant was not liable.

act through agents, it may with about equal plausibility be said on the one hand that every act of their authorized agents, and on the other that no such act is to be regarded as a direct act of the corporation. But a distinction is to be made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation, and are its only direct medium of communication with outside parties, they must in respect to all its external relations be considered as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the wilful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company."¹

What an agent says while acting within the scope of his authority is admissible against his principal as part of the *res gestae*; but not statements or representations made by him at any other time. Thus the letters of an agent to his principal containing a narrative of the transaction in which he had been employed are not evidence against the principal.²

§ 301. Damages for injury to property.—Where a corporation constructs its works in such a manner as to occasion unnecessary damage to the plaintiff's property, if the injury results from a cause which is either permanent in its character or is treated as permanent by the parties, damages may be assessed not only with reference to past, but to probable future injury.³ In an action against a gas com-

¹ Perkins v. N. Y. Cent. R.R. Co., 24 N. Y. 196, per SELDEN, Ch. J.

² Shelhamer v. Thomas, 7 Serg. & Rawle, 106; Levering v. Rittenhouse, 4 Whart. 130; Clark v. Baker, 2 Id. 340; Jordan v. Stewart, 23 Pa. St. 244; Patton v. Minesinger, 25 Id. 393; Pennsylvania R. R. Co. v. Books, 57 Id. 339.

³ Fowle v. New Haven & Northampton Co., 112 Mass. 334. In an action against a railroad company for damages caused by the improper construction of a bridge over a river whereby the water, being diverted, undermined the plaintiff's wharf, the jury were instructed that, though the acts of the defendant were wrongful, yet, if the

pany for injury to the plaintiff's well and premises occasioned by the flowage of noxious matter therein from the works of the defendant, and rendering the air insalubrious, the court, after stating one means of arriving at the damages, said : " Another means would be to ascertain the depreciation of the value of the property by reason of the erection of the gas works ; to ascertain for how much less the property would sell in consequence of the erection ; and in ascertaining that fact, all the circumstances which might show a depreciation in value should be considered. If the property would sell for the same amount as before the erection of the gas works, independent of a rise in similar property, there would be no loss ; but if it would not, then the difference would be the damages sustained."¹ For unlawful excavation and removal of a person's soil, he is entitled to recover, not the cost of refilling, but the amount of the diminution of the value of the property by the excavation and removal, that being the amount of the injury directly resulting from the acts complained of. A party, for any special injury to his use and occupation, is entitled to recover the damages accruing for such a length of time as will afford him a reasonable opportunity to put a stop to the same.²

If the legislature has authorized an act to be done by a corporation, the necessary and natural consequences of which are injurious to the property of a person, and at the same time has prescribed the particular mode in which the damage shall be ascertained and compensated, the corporation in doing the act cannot be liable as a wrong-doer.

plaintiff would have sustained no injury if he had not placed his wharf where he did, the defendant was not liable. Held error. *Perley v. Railroad*, 57 N. H. 212.

¹ *Karst v. St. Paul, etc., R.R. Co.*, 22 Minn. 118; *Loker v. Damon*, 17 Pick. 284; *Ludlow v. Yonkers*, 43 Barb. 493; *McGuire v. Grant*, 1 Dutch-er N. J. 356; *Sedgwick on Damages*, 28 Ill. 73.

¹ *Ottawa Gas Light Co. v. Graham*, 134, 135.

Where, therefore, commissioners had assessed the damages sustained by the owner of land taken by a railroad company under the statute, and the plaintiff's buildings were supplied with water from a permanent spring which disappeared after the company had excavated the land for its railroad, it was held that as it did not appear that the excavation was not made in a proper and reasonable manner, an action could not be maintained against the company for damages sustained by the destruction of the spring.¹

When a railroad company is authorized to build a bridge for its road on a street in a city, the company will not be liable to the owner of a lot for consequential damages caused by an embankment in front of his property constituting a necessary approach to the bridge.² A railroad company having obtained the grant of a right of way through certain streets of a city, provided the company did not unnecessarily impair the usefulness and convenience to the public of such streets, passed over a portion of the sidewalk in front of the plaintiff's property. In an action for damages in which the jury awarded him eight hundred dollars, he claimed that the construction of the railroad in such close proximity to the front of his house, and the frequent passage of trains, had rendered his dwelling uncomfortable and unsafe, and dangerous to his wife and children, and that his house was liable to be set on fire by some passing train. The judgment was, however, reversed.³

§ 302. Damages in case of personal injury.—If an agent doing business for a corporation do the business in such a careless or negligent manner that one who is without fault is

¹ Aldrich v. Cheshire R.R. Co., 21 N. H. 359. See Lebanon v. Olcott, 1 N. H. 339; Woods v. Nashua Manf. Co., 4 Id. 527; Stevens v. Middlesex Canal Co., 12 Mass. 466; Steele v. Western Inland Co., 2 Johns. 283; Cushing v. Baldwin, 4 Wend. 667; Mason v. Kennebec & Portland R.R. Co., 31 Me. 215.

² Slatten v. Des Moines Valley R.R. Co., 29 Iowa, 148.

³ Koelman v. New Orleans, etc., R.R. Co., 27 La. Ann. 442, WYLY, J., dissenting.

injured by the carelessness or negligence, the corporation is liable to pay the injured party the damages sustained in consequence of the injury. The intent of the law in this class of cases, is to establish such a measure of damages as will fully compensate the injured party for the injury he has sustained, whether it be loss of time, loss of money, bodily pain, or permanent bodily injury. The general rule in actions on the case for negligence is, that the party aggrieved is entitled to recover only to the extent of his actual injury. Where the suit is brought by the person injured, it may include a reasonable compensation for pain and suffering as well as the expense of medical attendance, and the loss of time consequent upon confinement. Unless the injury is wantonly inflicted, in which case exemplary damages may be given, the jury must be confined to damages strictly compensatory.¹ In an action against a railroad company for injuries received on a train by the negligence of the defendant's servants, the court, after stating to the jury the measure of damages, added : "These we think would be fair rules to ascertain the measure of damages the plaintiff would be entitled to in this case ; but if you can find any better ones than those suggested, you are at liberty to adopt them, as the measure and

¹ The plaintiff, who was a farmer 52 years of age, having been injured by the cars at a railroad crossing, was confined to his bed about nine weeks after the accident. He was greatly bruised, and his leg was broken near the hip joint. The injury was permanent, because the fracture failed to unite, and a false joint formed which shortened his leg two inches and a half. It was held that a verdict for eight thousand dollars damages was not excessive. *Finston v. Chicago, Rock Island, and Pacific R.R. Co.*, 61 Iowa, 452. Where, however, in consequence of the breaking of a cross tie, and the separation of the rails, the car in which the plaintiff was riding was thrown down an em-

bankment, and his leg badly broken, it was held that a verdict in his behalf against the company of \$10,000 for the injuries sustained by him was excessive. *Union Pacific R.R. Co. v. Hause*, 1 Wyoming Ter. 27. In *Murray v. Hudson River R.R. Co.*, 47 Barb. 196, the verdict being for \$8,000, a new trial was granted unless the plaintiff would reduce it to \$6,000. This disposition of the case was contrary to the decision in *Cassin v. Delany*, 38 N. Y. 178, where it was held that the General Term had no power to order the reduction of the verdict to a sum named as the alternative of a new trial. But the decision in Murray's case was affirmed by the Court of Appeals, 48 N. Y. 655.

amount of damages are entirely for you to ascertain under all the evidence and circumstances in the case." Held error.¹

The right to recover damages for injury to the person depends upon two concurring facts: 1st. The party claimed to have done the injury must be chargeable with some degree of negligence; 2d. The person injured must have been entirely free from any degree of negligence which contributed to the injury, that is, of any negligence without which the injury would not have happened. The question presented to the court is not one of comparative negligence as between the parties; nor does very great negligence on the part of the defendant so operate to strike a balance of negligence, as to give a judgment to a plaintiff whose own negligence contributed in any degree to the injury.²

In an action against a railroad company to recover damages for personal injuries sustained by the plaintiff, it is not proper for the judge to instruct the jury to deduct from the damages any sum paid to the plaintiff by an accident insurance company, such a payment not being *pro tanto* a discharge of the railroad company.³ "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff from the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tort feasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way con-

¹ Pennsylvania R.R. Co. v. Books, 57 Pa. St. 339. See Oliver v. North Pacific Transp. Co., 3 Oregon, 84.

² Wilds v. Hudson River R.R. Co., 24 N. Y. 430.

³ Pittsburg, etc., R.R. Co. v. Thompson, 56 Ill. 138.

tributary. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties, or by contract, or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit. But it is urged, on the part of the defense, that the plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay the damage, which of the two ought primarily to make compensation to the plaintiff and ultimately to bear the loss. If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment. But if the defendant should ultimately bear the loss, then the payment by the insurer and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest, and with which he has no concern."¹

§ 303. Mental suffering as an element of damage.—The weight of authority is in favor of the proposition that in estimating compensatory damages it is proper to consider the humiliation and degradation imposed upon the injured person by the wrong done him. The fact that the injury was inflicted under circumstances of peculiar indignity and degradation is to be regarded as an element of compensation even in cases where vindictive damages cannot be given.² In an

¹ Harding v. Townshend, 43 Vt. 536. etc., R.R. Co., 44 Iowa, 314; 24 Am.

² Smith v. R.R. Co., 23 Ohio St. 10; R. 748, DAY, J., dissenting; Craker Flagg v. R.R. Co., 43 Ill. 365; Smith v. Chicago, etc., R.R. Co., 36 Wis. 657; v. Holcomb, 99 Mass. 552; Meagher v. 17 Am. R. 504; Lake Erie & Western Driscoll, Ibid. 281; Kinley v. Chicago, R.R. Co. v. Fix, 88 Ind. 381. In the

action to recover damages by reason of a defective bridge, the jury were directed in assessing damages to take into consideration the peril, danger, and suspense to which the plaintiff was exposed ; and the Supreme Court approved the charge, and added that actual injury was not confined to the wounds and bruises upon the body, but extended to mental suffering.¹

It is the duty of every railroad corporation to carry its passengers safely and to treat them respectfully. It should protect them from violence and insult, and use reasonable precautions to make the journey safe and comfortable ; and it is bound to protect its passengers not only against the violence and insults of strangers and co-passengers, but of its own conductors, agents, and servants.² "If the passenger does not have such care, but, on the contrary, is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common law duty in support of his action ; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort the jury are allowed greater lati-

last of these cases, the plaintiff was expelled from a railroad train about eleven o'clock at night several miles from any station, and seven miles from his destination. No abusive language was used by the conductor ; but he refused to accept the ticket offered by the plaintiff, stopped the train, commanded the plaintiff to get off, placed his hand on the plaintiff's shoulder, and conducted

him to the steps of the car against his protestations, and in disregard of his statements and explanations.

¹ Seeger v. Barkhamsted, 22 Conn. 290. See Masters v. Warren, 27 Id. 300; Lawrence v. Housatonic R.R. Co., 29 Id. 390; Taber v. Houston, 5 Ind. 322; Cox v. Vunderkled, 21 Id. 164.

² Quigley v. Centr. Pacific R.R. Co., 11 Nevada, 350.

tude, and, in proper cases, may give exemplary damages."¹ In Craker v. Chicago & Northwestern R.R. Co.,² the conductor, by the use of some force, kissed the plaintiff, a female passenger. The company discharged the conductor, and did what it could to show its disapproval of his conduct. The jury assessed the damages at one thousand dollars, and the verdict was sustained on the ground that it was proper for them to take into consideration the insult to the plaintiff's wounded and outraged feelings. In an action against a railroad company for assault, it was proved that the plaintiff was a passenger in the defendant's car ; that on request he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it ; that the brakeman afterward approached the plaintiff, and in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket ; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open, and spill his brains right there on the spot ; that the brakeman stepped forward and placed his foot on the seat where the plaintiff was sitting, and leaning over the plaintiff, brought his fist close down to his face, and shaking it, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way ; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station ; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff ; that the plaintiff was at the time in feeble health, and had been for a considerable time under the care of a physician, and dur-

¹ Goddard v. Grand Trunk R.R. Co.,
57 Me. 217.

² 36 Wis. 657. See Johnson v. Wells,
Fargo & Co., 6 Nevada, 224.

ing the assault was reclining languidly in his seat ; that he had neither said nor done anything to provoke the assault ; that he had, in fact, paid his fare, had received a ticket, and had surrendered it to this brakeman, who delivered it to the conductor only a few minutes before, by whom it was afterward produced and identified ; that the railroad company was immediately notified of the misconduct of the brakeman, who was still in its employ when the case was tried, and no attempt was made by the company to excuse or justify his conduct. A verdict having been rendered in behalf of the plaintiff for \$4,850, the Supreme Court declined to disturb it.¹

In Maryland, in an action against a railroad by a passenger for his wrongful expulsion from a train, the following instruction was held correct : That if the jury should believe from the evidence that the plaintiff acted in a disorderly manner, and persisted in such disorderly conduct to the annoyance of the passengers, or refused to show his ticket on the demand of the conductor, and it then became necessary, under the rules and regulations of the company, for the conductor to eject him from the cars, and that he was so ejected, still, if they further find from the evidence that unnecessary force was used in such expulsion, then their verdict must be for the plaintiff, and in estimating the damages they may allow the plaintiff such sum of money as in their judgment will compensate him for the wounds and injuries inflicted upon him by the use of such unnecessary force, (if they shall find such wounds and injuries,) as

¹ Goddard v. Grand Trunk R.R. Co., *supra*. In this case the court said : "We confess it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers ; and it might as well not be applied to them at all, as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified, for no such cases will ever occur." TAPLEY, J., dissenting.

well as for the mortification and indignity placed upon him should they find any such; and if they shall further find that there was such unnecessary forcible expulsion, and that the defendant's employés acted in a wanton, high-handed, and outrageous manner, then they may allow the plaintiff such further sum of money as in their judgment may be a proper punishment of the defendant.¹ Where, however, in an action against a railroad company, the injury complained of by the plaintiff was his forcible ejection from a car of the defendant by the conductor, for the refusal of the plaintiff to pay fare which he was not liable to pay, for the reason that he had taken passage upon another car of the defendant, and paid the entire fare required to entitle him to a through passage, no unnecessary force was used, he sustained no material injury, and the conductor acted in good faith, it was held that the plaintiff was entitled to recover the damages sustained, irrespective of the motives of the conductor in putting him off; that these included not only compensation for the loss of time and the amount the plaintiff was obliged to pay for passage upon another car, but in addition thereto for the injury to his feelings, but not exemplary, punitive, or vindictive damages.²

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle or for some reason which the law recognizes as just and equitable, and founded in good public policy. An unreasonable rule that affects the convenience and comfort of passengers is unlawful. What are reasonable rules is a question of law to be determined by the court under all the circumstances of each particular case. If the act excluding a person from the cars is wrongfully and wantonly com-

¹ Phila., Wilm. & Balt. R.R. Co. v. Larkin, 47 Md. 155.

² Hamilton v. Third Av. R.R. Co., 53 N. Y. 25.

mitted, there may be recovered in addition to the actual damages, something for the indignity, vexation, and disgrace to which the party has been subjected.¹

§ 304. Damages where injuries cause death.—At common law, the right of action for damages on account of bodily injuries resulting in the death of an individual, and which belonged to him while he lived, is extinguished by his death. This defect of the common law is, however, remedied, in England and most of the States, by statute. Compensation for bodily injuries remains extinct, but a new grievance of a distinct nature, namely, the deprivation suffered by the husband or wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by statute the subject of a new cause of action in favor of these surviving relatives, which, in general, is to be prosecuted in point of form by the executor or administrator. In the New England States the form of procedure is by indictment, but the same end is to be attained, and the same rules of evidence and substantially the same principles of law are to be applied, as though it was a civil action for damages.² Where the wrongful act which results in death occurred beyond the limits of the State in which the action is brought, the complaint will be dismissed, as the right of action rests upon a statute which has no extraterritorial force.³

¹ Chicago & Northwestern R.R. Co. v. Williams, 55 Ill. 185.

² State v. Grand Trunk R.R. Co., 58 Me. 176; 60 Id. 145; 61 Id. 114; State v. Cent. R.R. Co., 60 Id. 490; State v. Gilmore, 24 N. H. 461; Boston, etc., R.R. Co. v. State, 32 Id. 215; State v. Railroad, 52 Id. 528; Com. v. Boston, etc., R.R. Co., 11 Cush. 512; Com. v. Vt. & Mass. R.R. Co., 108 Mass. 7.

N. Y. 352; Richardson v. N. Y. Cent. R.R. Co., 98 Mass. 85. But see Selma, etc., R.R. Co. v. Lacy, 49 Ga. 106. While the courts of one State will, in a spirit of comity, enforce the statute of another State in favor of a party in an action in the former to recover damages for injury done in the latter, yet, as the cause of action arises exclusively in the latter State, the rights of the plaintiff are controlled by its statute. *Ibid.*

³ Mahler v. Transportation Co., 35

If the person injured obtains satisfaction by action or by voluntary settlement and payment, before death ensues, the wrongful act which caused the injury, and all its consequences past and future, are included, and the whole cancelled together, and the liability of the party inflicting the injury terminated.¹ If an action for the injury could not have been maintained by the deceased himself if he had lived, by reason of his own negligence, such an action cannot be sustained by his personal representatives.² As a rule, damages cannot be allowed for the physical or mental sufferings of the deceased.³ But in Tennessee, where a person is killed by being run over by a railroad train, the damages recoverable are those sustained by the deceased and which he could have recovered if he had lived, and not those suffered by his widow and children in consequence of his being killed. If therefore the killing is instantaneous, an action cannot be maintained.⁴

In Connecticut, under the statutes of 1848 and 1853 providing that a suit for injury to the person, whether the same do or do not result in death, shall survive to his executor or administrator, the right of action embraces damages for personal injuries and sufferings of the party injured if he lives and brings suit; and if he dies, the same cause of action, that is, for the same damages, survives to his executor or

¹ Read v. Gt. Eastern R.R. Co., 3 Q. B. 535; Dibble v. N. Y. & Erie R.R. Co., 25 Barb. 183.

² Wilds v. Hudson River R.R. Co., 24 N. Y. 430; Louisville, etc., R.R. Co. v. Burke, 6 Coldwell, 45; Tucker v. Chaplin, 2 Car. & K. 730; Witherly v. Regents Canal Co., 12 Com. B. N. S. 2.

³ Lehman v. Brooklyn, 29 Barb. 234. See Blake v. Midland R.R. Co., 18 Q. B. 93; Pa. R.R. Co. v. Books, 57 Pa. St. 339; Grotenkemper v. Harris, 25 Ohio St. 510; Telfer v. Railroad Co., 1 Vroom N. J. 188.

⁴ Louisville, etc., R.R. Co. v. Burke, *supra*. The railroad company is responsible for damages unless it shows that the precautions prescribed by the statute were taken, and although it may appear that if it had done so the accident would have occurred. But negligence of the person killed which caused or contributed to the accident, or without which the accident would not have happened, may be taken into consideration by the jury in determining the amount of damages. *Ibid.*

administrator. In the latter case, the question of damages does not turn on the extent of the former dependence of the relatives of the deceased on him, his interest in or generosity toward them, the amount of his earnings, or the probable length of his life, and his character and conduct.¹ In North Carolina and Pennsylvania, in an action under the statute for an injury resulting in death, the ground of recovery is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. It is competent to inquire into the age of the deceased, his strength, health, skill, and industry, his habits and character, the end of all being to get at his pecuniary worth to his family.² In an action under Lord Campbell's act³ by a father for injury resulting from the death of his son through the negligence of the servants of a railroad company, it ap-

¹ Goodsell v. Hartford & New Haven R.R. Co., 33 Conn. 51; Seger v. Barkhamsted, 22 Id. 290; Masters v. Warren, 27 Id. 293. See Waldo v. Goodsell, 33 Id. 432. The statute of Connecticut provides in substance that where a life is lost by reason of the negligence of a railroad company, such company shall be liable to pay damages not exceeding five thousand, nor less than one thousand dollars, to the use of the executor or administrator in an action for the benefit of the husband or widow, or children or heirs. The action must be commenced within one year after the cause of action has accrued. The statute of limitations will not, however, begin to run until after an administrator is appointed, who can bring suit. Andrews v. Hartford & New Haven R.R. Co., 34 Conn. 57. The statute of New York (Sess. Laws of 1870, vol. I, p. 215, ch. 78), provides that "Every such action shall be brought by and in the name of the personal representatives of such deceased person. And the amount recovered in every

such action shall be for the exclusive benefit of the husband or widow and next of kin of such deceased person, and shall be distributed to such husband or widow and next of kin in the proportion now provided by law in relation to the distribution of personal property of persons dying intestate. And in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death, to the husband or widow, and next of kin of such deceased person." See Whitford v. Panama R.R. Co., 23 N. Y. 465; McIntyre v. N. Y. Cent. R.R. Co., 37 Id. 287, 289; Mitchell v. N. Y. Cent. & Hudson River R.R. Co., 2 Hun. 535; Lehman v. Brooklyn, 29 Barb. 234.

² Kesler v. Smith, 66 N. C. 154; Pa. R.R. Co. v. Henderson, 51 Pa. St. 315; Cleveland & Pittsburg R.R. Co. v. Rowan, 66 Id. 393.

³ 9 & 10 Vict., ch. 93, sec. 1.

peared that the son, who was twenty-seven years of age and unmarried, but living away from his parents, had for the previous seven or eight years been in the habit of visiting them once a fortnight, and of taking them on those occasions presents of tea, sugar, and other provisions, besides money amounting in the whole to about £20 a year. It was held that the father had such a reasonable expectation of benefit from the continuance of his son's life, as to entitle him to recover damages under the statute ; but not for the expenses incurred by him for his son's funeral, or for family mourning.¹ In Ohio, in an action under the statute to recover damages for wrongfully, negligently, and carelessly causing the death of a person, the following charge to the jury was held free from error : That the damages must be confined to the pecuniary injuries resulting to the next of kin from the death of their brother ; that these in their nature were uncertain and indefinite ; that if the deceased had lived, the next of kin might not have been benefited, and if not, then no pecuniary injury would have resulted to them from his death ; that it was difficult to get at the pecuniary loss with precision and accuracy ; but that, taking all the facts and circumstances into consideration, the jury were, according to their deliberate judgment, to determine whether the parties for whose benefit the action was brought had suffered any pecuniary injury ; and if so, then the jury were to assess such damages as they should deem fair and just ; with the further caution that it was only the pecuniary value of the life of the deceased to his next of kin, that is, the pecuniary value they would have derived had his life not been terminated, that constituted their claim for damages on account of his death.² In California, when in an action under

¹ Dalton v. Southeastern R.R. Co., St. 510. In an action against a railroad company for wrongfully causing the death of a brakeman on the road, it was proved that the father of the deceased was fifty years old, and had lit-

² Grotenkemper v. Harris, 25 Ohio

the statute of 1862, by an administrator against a railroad company to recover damages for the death of the husband, the widow dies before trial, the only question to be determined with reference to the amount of damages is, what sum will be a fair and just compensation to the children for the loss sustained by them in the death of their father. This cannot be determined by first ascertaining what would have been a just compensation to the widow and children jointly had she been still living, and then subtracting from the gross sum the proportion to which the widow would have been entitled if she had lived; the loss which she suffered, ceasing to be an element in the computation.¹

§ 305. Exemplary damages.—Corporations may render themselves liable for exemplary damages by the misconduct of their agents or servants while acting within the scope of their employment.² But it is a doctrine capable of being greatly abused, and courts should be careful that it is not misapplied. The principle which governs these cases is found in the maxim that the act of the agent, done within the scope and in the exercise of his employment, is in law the act of the principal.³ Blackstone says: “The master

title property besides his homestead; that the deceased lived with his father when not on the road and contributed to the support of the family; and that his father had an insurance policy on his, the father's, life for the benefit of the mother of deceased, the premium upon which the deceased had paid, and promised to continue to do so. It was held that a verdict for \$2,000 was not excessive. *Chicago & Alton R.R. Co. v. Shannon*, 43 Ill. 338.

¹ *Taylor v. Western Pacific R.R. Co.*, 45 Cal. 323. See *Myers v. San Francisco*, 42 Cal. 215.

² *Balt. & Ohio R.R. Co. v. Blocher*, 27 Md. 277; *Pittsburg, etc., R.R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic & Gt. Western R.R. Co. v. Dunn*, Ib. 162.

³ In *Hopkins v. Atlantic & St. Lawrence R.R. Co.*, 36 N. H. 9, PERLEY, C. J., in delivering the opinion of the court, said: “If a corporation like this railroad company is guilty of an act or default, such as in the case of an individual would subject him to exemplary damages, we think the same rule must be applied to the corporation. . . . According to the general theory of the common law, crimes are prosecuted and punished by the State alone. Individuals are not supposed to have any private interest in the punishment of public offences. And so, on the other hand, as a general rule, the plaintiff in a civil action recovers a mere compensation for his private injury. The object of the suit is to redress the individual damage.”

may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same—that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong.”¹

The doctrine of the legal unity of the principal and agent in respect to the wrongful and tortious as well as the rightful acts of the agent done in the course of his employment, is not an innovation upon the rules of the common law, but is as old as the right of trial by jury itself.² In 1763, Lord Chief Justice PRATT (afterward Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages.³ In another case, the same learned judge declared, with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty.⁴

In this country, the right of the jury to give exemplary damages has been much discussed, but, notwithstanding

vidual wrong which the plaintiff suffered, and not to repress crime or enforce good morals by inflicting punishment on the defendant; and it has been very lately questioned whether any exception to this rule ought to have been admitted. It is, however, extremely well settled that exemplary or vindictive damages may in certain cases be recovered, and this is perhaps in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of certain offences. Where the wrong done to the party partakes of a criminal character, though not

punishable as an offence against the State, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may in such cases encourage prosecutions where a mere compensation for the private injury would not repay the trouble and expense of the proceeding.”

¹ *I Blk. Com.*, p. 431.

² See *New Orleans, etc., R.R. Co. v. Bailey*, 40 Miss. 453.

³ *Huckle v. Money*, 2 *Wilson*, 205.

⁴ *Campbell's Lives of the Chancellors*, Am. Ed., vol. 5, p. 214.

opposition, the doctrine must be regarded as now firmly established.¹ In *Milwaukee & St. Paul R.R. Co. v. Arms*,² DAVIS, J., in delivering the opinion of the Supreme Court of the United States, said: "It is undoubtedly true that

¹ See *Goddard v. Grand Trunk R.R. Co.*, 57 Me. 202. "It seems to have been first opposed by Mr. Theron Metcalf, afterward reporter and judge of the Supreme Court of Massachusetts, in an article published in 3d American Jurist in 1830. The substance of this article was subsequently inserted in a note to Mr. Greenleaf's work on Evidence. Mr. Sedgwick, in his work on damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in the Boston Law Reporter, vol. 9, p. 529; and Mr. Sedgwick rejoined in the same periodical, vol. 10, p. 49. Essays on different sides of the question were also published in 3d American Law Magazine, N. S., 537, and 4 American Law Magazine, N. S., 61." *Ibid.* "Damages," says Greenleaf, "are given as a compensation, recompense, or satisfaction to the plaintiff for injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more, nor less; and this whether it be to his person or estate. It is frequently said that in actions *ex delicto* evidence is admissible in aggravation, or in mitigation, of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive."

² Greenl. Ev., secs. 253, 266. See Sedgwick on Damages, ch. 1, Mar. p. 38; ch. 18, 464, *et seq.*

² 91 U. S. 489. Where exemplary damages were awarded against a railroad company for injury sustained by a collision through the negligence of the company's servants, the United States District Judge, in overruling a motion for a new trial, said: "Punitive damages, it is true, are in the nature of punishment; and it is equally true that in ordinary cases it is contrary to our ideas of justice that the defendant should receive more than compensation for the injuries he sustained. But in cases like the one at the bar, although the excess above the amount of real damages goes to the plaintiff, still it is well settled that it is one of the means of securing more care and attention on the part of corporations having great rights and privileges that in cases of injury arising from the gross misconduct or negligence of their employés, they are liable to punitive damages. It is a right and interest the public have in every prosecution of this kind that these companies shall be taught, so to speak, that they are held to exercise not only ordinary care, but extraordinary care, in the transportation of passengers, and on these grounds courts are inclined to uphold the reasonable verdicts of juries where punitive damages are awarded." *Beale v. Railway Co.*, 1 Dillon, 568, per LANE, J. In *Goddard v. Grand Trunk R.R. Co.*, 57 Me. 202, the court said: "All attempts to distinguish between the guilt of the servant and the guilt of the corporation, or the punishment of the servant and the punishment of the cor-

the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are therefore proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the true measure of redress. But jurists have chosen to place this doctrine on the ground not that the sufferer is to be recompensed, but that the offender is to be punished; and although some text writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country. It has also received the sanction of this court."

When a railroad company adopts all rules and regulations needful for the safety of passengers, honest, competent, and trustworthy men, whose duty it is to see that these rules and regulations are observed, in case of injury to passengers, the company will not be held liable for punitive damages.¹ But a corporation may be subjected to such dam-

poration, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet, under cover of its name and authority, there is as much that is as deserving of punishment as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks—since no coercive influence can be brought to bear upon them except

that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial, in its application to them, than in its application to natural persons." The right of the jury in actions for torts to give exemplary damages was first declared in Maine, in *Pike v. Dilling*, 48 Me. 539.

¹ *Ackerson v. Erie R.R. Co.*, 32 N.J. 254. See *Henson v. Erie R.R. Co.*, 62 Me. 84; *Phila., etc., R.R. Co. v. Larkin*, 47 Md. 155; *Taylor v. Grand Trunk R.R. Co.*, 48 N.H. 304; *Gillett*

ages if a natural person would be so liable under similar circumstances,¹ or if the plaintiff would have been entitled to recover such damages had the suit been against the agent.² If a railroad corporation employs incompetent, drunken, or reckless servants, knowing them to be such, or, having employed them without such knowledge, retains them after learning the fact, or after full opportunity to learn it, the company will be liable to punitive damages.³ To warrant a jury in finding a verdict for exemplary damages, either malice, fraud, oppression, or indifference to the rights of others, must be shown to have mingled in the acts complained of.⁴

In Missouri, Mississippi, and Texas, to render a corporation liable for such damages, it must have been negligent in selecting or instructing the agent, or have ratified the wrongful act; but slight acts of ratification will generally be sufficient.⁵ In a case in Mississippi it was proved that

v. Mo. Valley R.R. Co., 55 Mo. 315, 322; Gasway v. Atlanta & West Point R.R. Co., 58 Ga. 216.

¹ Atlantic, etc., R.R. Co. v. Dunn, 19 Ohio St. 162; 2 Am. R. 382; Pittsburg, etc., R.R. Co. v. Slusser, 19 Ohio St. 157; McKinley v. Chicago, etc., R.R. Co., 44 Iowa, 314; Fay v. Parker, 53 N. H. 342.

² Hamilton v. Third Avenue R.R. Co., 53 N. Y. 25; Townsend v. N. Y. Cent. & Hudson River R.R. Co., 56 Id. 295.

³ Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Boulard v. Calhoun, 13 La. Ann. 445; Fowler v. Chichester, 26 Ohio St. 9; Jeffersonville R.R. Co. v. Rogers, 38 Ind. 116; Western Union Tel. Co. v. Eyser, 2 Col. 141; Belknap v. Boston & Me. R.R. Co., 49 N. H. 358; Ill. Cent. R.R. Co. v. Hammer, 72 Ill. 347; Grund v. Van Vleck, 69 Id. 478. See Nashville, etc., R.R. Co. v. Starnes, 9 Heisk. Tenn. 52. In Illinois

it has been regarded as settled law, since the decision in St. Louis, Alton & Chicago R.R. Co., 19 Ill. 353, that if the wrongful act is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to exemplary damages, and that a person openly and notoriously exercising the functions of a particular agency will be presumed to have sufficient authority from the corporation to so act. Singer Manf. Co. v. Holdfoft, 86 Ill. 455.

⁴ New Orleans v. Statham, 42 Miss. 607. When fraud, malice, gross negligence, or oppression intervenes, the law blends the interest of society and of the aggrieved individual, and gives such damages as will operate as an example of warning to deter others from similar transactions. Louisville, etc., R.R. Co. v. Guinan, 11 Lea Tenn. 98.

⁵ Perkins v. Missouri, etc., R.R. Co., 55 Mo. 201; Trigg v. St. Louis, etc.,

the plaintiff was carried four hundred yards beyond the station where he told the conductor he wished to stop ; that he requested the conductor to run the train back, which the conductor refused to do, and told the plaintiff to leave the train or he would carry him to the next station ; that the plaintiff got off and walked back, carrying his valise in his hand ; and that the company afterward refused to discharge the conductor. The jury having found a verdict for four thousand five hundred dollars, the court refused to disturb it.¹

In Wisconsin the rule is, that although a principal is liable to the extent of compensatory damages for a malicious injury inflicted upon another by his agent acting within the scope of his employment, yet he is not liable to exemplary damages unless he directed the injurious act to be done, or subsequently confirmed it;² and that where the principal, after notice that his agent has committed tortious acts against another, retains the agent and even places him in a position of greater responsibility, it will be for the jury to determine whether the acts of the agent have been thereby ratified.³

In New York the following rule has been adopted in cases of negligence : For injuries by the negligence of an agent while engaged in the business of the principal within the scope of his employment, the latter is liable to compensatory damages ; but for such negligence, however gross or culpable, he is not punishable in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the

R.R. Co., 74 Id. 147 ; New Orleans, etc., R.R. Co. v. Burke, 53 Miss. 20 ; Chicago, etc., R.R. Co. v. Scurr, 59 Id. 456 ; Hays v. Houston, etc., R.R. Co., 46 Texas, 272. A similar rule seems to prevail in Rhode Island. Hagan v. Prov. & Worc. R.R. Co., 3 R. I. 88. See Phila., etc., R.R. Co. v. Derby, 14

How. 486 ; Turner v. North Beach & Missouri R.R. Co., 34 Cal. 594.

¹ New Orleans, etc., R.R. Co. v. Hurst, 36 Miss. 660.

² Railroad Co. v. Finney, 10 Wis. 388 ; Craker v. Railroad Co., Ib. 657.

³ Bass v. Chicago & Northwestern R.R. Co., 42 Wis. 654.

agent was authorized or ratified, or that the master employed or retained the agent knowing that he was incompetent, or from bad habits unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and be clearly established. If a railroad company knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company or to a superintendent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may be amenable to the severest rule of damages.¹

¹ Cleghorn v. N. Y. Cent. & Hudson River R.R. Co., 56 N. Y. 44. In this case, which was an action against a railroad company for injuries caused by the carelessness of a switchman in neglecting to close the switch after a freight train had passed on to a side track, and in giving a false signal to an approaching passenger train that the track was all right, CHURCH, C. J., in delivering the opinion, said: "It is unnecessary in this connection to speak of the strength of the proof upon which a claim for exemplary damages was made in this case. It is sufficient to say that the evidence was competent upon the question of gross negligence on the part of the defendant in employing or continuing the employment of a subordinate known to be unfit for his position by reason of intoxication. A more serious question arises upon the charge of the judge in relation to exemplary damages. He charged that 'In awarding damages in this class of cases it will be your duty always to award to the plaintiff full compensation for the injuries she received; and to that you may add such sum for exemplary damages as the case calls for; depending in a great measure, of course, upon the conduct of the defendant'"; which was excepted to. This is claimed to be an instruction that in all cases of this character the jury may in their discretion award exemplary damages, with the qualification only that such damages are in a great measure dependent upon the conduct of the party. If this is the proper construction of the charge, it was clearly erroneous. It is the exception and not the rule that in this class of cases, exemplary damages are allowable. It is unnecessary to discuss the question at large in this case, nor to refer to the numerous decisions, some of which are conflicting upon the general subject. . . . I am not aware of any principle which permits a jury to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified. . . . We cannot say that the effect of this part of the charge was obviated by the general remarks which followed respecting the intemperate habits of the switchman, and the evidence that the station-master had knowledge of such habits. The jury were nowhere instructed what facts were requisite to be found before *any* amount of exemplary damages could be awarded; and

When the element of exemplary damages is introduced it becomes proper to inquire into the condition and circumstances of the defendant.¹

the closing observation of the judge upon this point indicates that he intended to leave the rule and its application to the discretion of the jury. . . . The rule with its limitations should have been explicitly stated. We have not observed any hesitation on the part of juries to award full damages in this class of cases when the rules applicable to them have been promulgated with the restrictions and limitations which the law has established.

There is necessarily a wide margin for the exercise of judgment in awarding compensatory damages in such cases; and when the jury are permitted to award punitive damages without limit or restriction, injustice may be done." See *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Gt. Western R.R. Co. v. Miller*, 19 Id. 305.

¹ *Belknap v. Boston & Me. R.R. Co.*, 49 N. H. 358. See *Fay v. Parker*, 53 Id. 342.

CHAPTER XVII.

AMOTION AND DISFRANCHISEMENT.

<p>§ 306. Nature and power of amotion. 307. Grounds for the exercise of the power of amotion. 308. Proceedings in removal from office. 309. Meaning and nature of disfranchisement. 310. Power of corporation to expel its members.</p>	<p>§ 311. Ground for expulsion of members. 312. Proceedings upon removal of members. 313. Removal of members of unincorporated societies. 314. Waiver of objection to proceedings in amotion or disfranchisement.</p>
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§ 306. Nature and power of amotion.—The right to remove an incumbent from office is called the power of amotion, as distinguished from disfranchisement, which is only applicable to a member as such; for a corporator holding an office may be removed from it, and still continue to be a member. The power to remove an officer for adequate cause is an inherent incident of all corporations, at common law, whether municipal or private, though, as already observed, the exercise of the power may not affect the private rights of the corporator in the franchise;¹ and it is incident to the whole body unless limited by express grant to a particular part.² The act creating a corporation incor-

¹ *Rex v. Richardson*, 1 Burr. 539; *Same v. Ponsonby*, 1 Ves. Jun. 7; *Same v. Lyme Regis*, Dougl. 153; *Same v. Tidderly*, 1 Siderf. 14; *Bruce's Case*, 2 Stra. 819; *Reg. v. Newbury*, 1 Q. B. 751; *Fawcett v. Charles*, 13 Wend. 473; *Smith v. Smith*, 3 Desaus. 557; *State v. Trustees*, etc., 5 Ind. 77; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

² *Rex v. Mayor, etc.*, of *Lyme*, Dougl. 153; *Rex v. Taylor*, 3 Salk. 231; *Bruce's Case*, *supra*; *Rex v. Feversham*, 8 Term R. 536. See *People v. Medical Soc.*, 24 Barb. 570; *People v. Board of Trade*, 45 Ill. 112; *State v. Chamber of Commerce*, 20 Wis. 63. Such a power is as necessary to the order and good government of corporate bodies, as the power to make by-

porated certain individuals and their successors who were named trustees. It created the office of superintendent, and provided that the corporation should have charge of the general interests of the institution, and should appoint the superintendent for a term of ten years, who should be subject to removal only for infidelity to the trust reposed in him or for incompetence. It was held that this power of removal was conferred upon and designed to be exercised by the board of trustees, and was limited to the causes named; that they might act upon their own observation and judgment; and that whenever they were prepared to take the responsibility of saying that the incumbent did not possess the necessary qualifications for his office, they had the right, and it was their duty, to remove him for such cause.¹

§ 307. Grounds for the exercise of the power of amotion.—The causes for which a corporator may be removed from an office have been arranged under three principal heads: 1st. Such as relate merely to his official character, and affect the general interests of the corporation; 2d. Such as have no immediate relation to his corporate or official character, but are in themselves of so infamous a nature as to render the offender unfit to hold any office, as perjury, forgery, and the like; 3d. Offences of a mixed nature, being not only contrary to his corporate or official duty, but indictable.² When the charter specifies certain grounds on which alone

laws. Amotion being an act of an odious nature, the provisions of the charter concerning it should receive a strict construction. The word majority mentioned in a charter in relation to amotion, was held to mean a majority of the whole corporation. *Reg. v. Sutton*, 10 Mod. 76.

¹ *People v. Higgins*, 15 Ill. 110. The removal of a mere ministerial officer of a corporation who is its private agent,

is a right which belongs to it alone, the court having no power in this respect. The assistance of the courts can only be invoked against such officers as are by law intrusted with the management of the affairs of the corporation. As against the latter, the remedy is purely legal. *Neall v. Hill*, 16 Cal. 145.

² *Kyd on Corp.* vol. 2, pp. 62, 63; *Grant on Corp.* 241, 242.

an officer can be removed, he cannot be removed for any other.¹ A total desertion of his duties is a good cause, and so likewise is a wilful disqualification of himself by habitual drunkenness.² Non-attendance at some of the meetings is not sufficient cause for amotion.³ When, however, the attendance of the officer at corporate meetings is essential to the interests of the corporation, non-attendance, even without actual damage to the corporation, may be a good cause.⁴ When a person holds office at pleasure, or at discretion, he may be removed at pleasure, and a notice to him to appear and answer is unnecessary.⁵

§ 308. Proceedings in removal from office.—In order to determine an office before the expiration of its term, there must be a removal or amotion by a competent power. If there be a resignation there must be an acceptance; or if there be an absolute vacation of the office, it must be recognized and acknowledged. When the original title to an office is sufficient, though good cause for amotion be shown, even in a case where the charter declares that for such cause the officer shall vacate his office, the office is not determined until there is an amotion.⁶ The consistory of a church, after having been lawfully elected and formally inducted into office, seceded and renounced the authority of the superior church judicatories, the classis, and the gen-

¹ State v. Jersey City, 1 Dutcher, 536; Shaw v. Mayor, 19 Ga. 468.

² Bull N. P. 206; Rex v. Gloucester, 3 Bulstr. 190; Rex v. Taylor, 3 Salk. 231.

³ Rex v. Richardson, 1 Burr. 517. In the foregoing case the court declined to say what kind of absence, or under what circumstances non-attendance might be a cause of forfeiture.

⁴ Rex v. Harris, 1 B. & Ad. 936; Rex v. Ipswich, 2 Ld. Raym. 1237; Rex v. Wells, 4 Burr. 2004. See Rex v. Truebody, 11 Mod. 75; Rex v. Portsmouth, 3 B. & C. 56; Hawley's Case, 1 Vent. 115.

⁵ Rex v. Coventry, 1 Ld. Raym. 391; Salk. 430; Rex v. Oxford, Salk. 428; Rex v. Canterbury, Strange, 674; Reg. v. Governors of Darlington School, 6 Q. B. 682; Rex v. Andover, 1 Ld. Raym. 710; Rex v. Cambridge, 2 Show. 69; Papy's Case, 1 Vent. 342; Rex v. Churchwardens, Cowp. 413; Madison v. Korbly, 32 Ind. 74; Reg. v. Thomas, 8 Ad. & E. 183.

⁶ Murdock v. Phillip's Academy, 12 Pick. 244; Com. v. German Soc., 15 Pa. St. 251; State v. Trustees, etc., 5 Ind. 77.

eral synod, and united with another ecclesiastical body. But they did not resign or by any other act divest themselves of their offices. Some days afterward they were tried according to the laws of the church, found guilty, and a declaration made that their seats as members of the consistory of the church were vacant, and that they were deposed from their respective offices. It was held that the consistory were not divested of their offices until the classis, whose rightful duty it was, deposed them.¹ As a rule, an officer has a right to be summoned and to be afforded an opportunity of explaining his conduct and defending himself before the body in which is vested the power of amotion. There need not, however, be a summons when he has permanently left the corporate jurisdiction, and in fact abandoned his office, for in such case a summons or notice that the amotion would take place would be an idle form.² Where an officer declared that he would serve no longer, and had in other respects misbehaved himself, and was removed without notice, the court of king's bench refused a mandamus to restore him, the causes of removal appearing sufficient.³

It is not a ground for excepting to the amotion that the officer was not summoned, if in fact he was present at the meeting of the amoving body and was heard in his de-

¹ Doremus v. Dutch Reformed Church, 2 H. W. Green N. J. 332.

² Cas. Temp. Hardw. 151; Reg. v. Truebody, 2 Ld. Raym. 1275; Rex v. Grimes, 5 Burr. 2601; Rex v. Harris, 1 B. & Ad. 936. The acceptance of a statutory office requiring continual attendance at a great distance from the borough, was held a virtual abandonment of a corporate office requiring perpetual attendance in the borough. Rex v. Griffiths, 3 B. & Ald. 735. It was held in an early case in Massachusetts, that the granting of a writ of mandamus in proper cases, as well to

admit a person to an office to which he had been lawfully chosen, as to restore one to an office from which he had been unlawfully removed, was within the jurisdiction of the court, but that the cases in which this writ might be an adequate remedy in admitting or restoring to office seemed to be where the office was for a longer term than a year, or where the return to the writ involved merely a question of law, so that, admitting the facts to be true, a peremptory mandamus ought to be issued. Howard v. Gage, 6 Mass. 462.

³ See Smith v. Smith, 3 Dessaus. 557.

fense.¹ The members of the body who are to meet for the purpose of amoving an officer must have been summoned to the meeting and have had notice of the business to be brought before it, unless the meeting is held by adjournment from one at which every member of the corporation was duly notified to be present, and where the subject was commenced and gone into to a certain extent.² This power must be exercised with caution and regularity. A meeting cannot by mere force and caprice drive away an officer whose term has not expired, in violation of all the forms of the proceedings and principles of the society. In the "preparative meetings" of the Society of Friends the office of clerk is the most important. He decides all questions that arise, and also has a right to open and organize the meeting. Where in one instance by the turbulence of some of the members present the clerk was prevented from taking his seat at the table in the regular room and compelled to hold the meeting in an adjacent place, it was held that this did not deprive him of his office, nor prevent the discharge of his duty, nor the orderly organization of the meeting presided over by him.³ When the charter or a by-law prescribes the manner in which the power of amotion shall be exercised, the proceedings must be in conformity therewith.⁴ When the offence for which an amotion is contemplated is against the incumbent's duty of office, it is to be tried and determined only by the corporation in the first instance; but if, on a return to a mandamus or on an answer to an information *quo warranto*, the corporation states the cause for which it amoved, the court will judge whether or not the cause is reasonable or sufficient.⁵

¹ Rex v. Wilton, Salk, 428; Rex v. Fishermen of Feversham, 8 Term R. 356; Rex v. Burgesses of Carmarthen, 1 M. & Selw. 697.

² Rex v. Liverpool, 2 Burr. 733; Rex v. Langhorne, 4 A. & E. 538; Rex v. Harris, 1 B. & Ad. 936.

³ Field v. Field, 9 Wend. 394.

⁴ Reg. v. Sutton, 10 Mod. 76; Reg. v. Ricketts, 7 Ad. & E. 966; State v. Lingo, 26 Mo. 496; State v. McGarry, 21 Wis. 496.

⁵ Rex v. Richardson, 1 Burr. 541.

Where the offence constitutes a crime, a conviction must in general precede the amotion,¹ but not when the offence is both indictable and contrary to the offender's duty as an officer.² The return to an order to show cause should state the reason, specifying the particular instances of violation of duty and also the proceedings, in order that the court may judge of the legality of the one and the regularity of the other.³

For a creditor to maintain an action for the removal or suspension of directors, he must allege in his complaint the nature of the claim or demand, when and how the indebtedness arose, and the amount due, so that the corporation can readily determine its validity. It is obvious that a corporation has a right to pay its creditors and thus avoid the removal or suspension of its directors, and common fairness requires that payment of a debt shall be demanded of a corporation before such an action is commenced. Abuse by directors of their trusts or gross misconduct or fraud cannot be presumed without proof. Hearsay evidence or affidavits verified on information and belief are not sufficient to sustain such a charge. Stockholders who did not vote against certain directors must be deemed to have acquiesced in all acts in connection with their office done prior thereto, provided such stockholders had information sufficient to put them on inquiry, but not the merely voting or neglecting to vote for such directors. When directors are only unwise, or merely extravagant, or misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places.⁴ An action was brought by a creditor and stockholder of a corporation for the purpose, among other things, of compelling the officers of the corporation, who were named as defendants, and who

¹ Rex v. Derby, Cas. Temp. Hardw. 154.

² Ibid. See Grant on Corp. 241, 242.

³ Com. v. Guardians of the Poor, 6 Serg. & Rawle, 469.

⁴ Ramsey v. Erie R.R. Co., 7 Abb. Pr. 156; 38 How. Pr. 193.

were charged in the complaint with having control of its affairs, to account for their official conduct in the management and disposition of its funds and property ; and, upon allegations of abuse of trust and gross misconduct by them in respect to such funds and property, to obtain their removal from office. It was held that if the plaintiff stood in relation to the defendants of creditor or stockholder of the corporation, the court had no right to look into his motives in bringing the suit, notwithstanding his malice was thereby gratified or his independent litigations incidentally subserved.¹

§ 309. Meaning and nature of disfranchisement.—Disfranchisement has been defined to be the taking of a franchise from a man for some reasonable cause ;² that is, for a cause which is just and legal.³ The power of disfranchisement or expulsion of an unworthy member from the corporation involves a deprivation of all of the privileges, rights, interests, profits, and advantages which he enjoyed when he was a corporator. Disfranchisement has often been confounded with amotion, and the terms treated as convertible, especially in the early cases, although there is a broad distinction between them ; for amotion is, as we have already seen, removal from an office in a corporation, while disfranchisement is the taking away of the privilege of being a corporator any longer. This right is incident to every corporation, excepting in cases of trading and monetary bodies, where the exercise of such a power would be inconsistent with their charters, and frequently impossible ;⁴

¹ *Ramsey v. Gould*, 57 Barb. 398. The general rule is that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds should be brought in the name of the corporation, and not in that of the stockholders or any of them.

² *Symmers v. Reg.*, Cowp. 502.

³ *Rex v. Liverpool*, 2 Burr. 732.

⁴ *Grant on Corp.* 263; *People v. N. Y. Com. Assoc.*, 18 Abb. Pr. 271; *People v. Fire Underwriters*, 7 Hun, 248; *People v. Chicago Board of Trade*, 45 Ill. 112; *State v. Chamber of Commerce*, 20 Wis. 63; *People v. Medical Soc.*, 24 Barb. 570; *Davis v. Bank of*

but, judging from the decisions on the subject, the power of disfranchisement has seldom been exercised.

§ 310. Power of a corporation to expel its members.—The power of disfranchisement must in general be conferred by statute, except in two cases : conviction of the member in a court of justice of an infamous offence ; and where he has committed some act against the corporation which tends to its destruction or injury. We have seen that the power to make by-laws is incident to corporations, and usually expressly conferred by statute ; but by-laws which vest in a majority the power of expulsion for minor offences, are, in so far, void.¹

When the charter provides for an offence, directs the mode of proceeding, and authorizes the corporation, after a hearing, trial, and conviction, according to the mode prescribed, to expel the defendant, the sentence is conclusive upon the merits, and cannot be inquired into collaterally, either by mandamus or action, or in any other way. It is like an award made by a tribunal of the party's own choosing ; for he became a member under and subject to the articles and conditions of the charter, and of course to the provisions on this subject as well as others.² An association declared in its charter that its purpose was, among other things, “to inculcate just and equitable principles of trade,” and it was vested with power to expel any member in such manner as might be directed in its by-laws. The by-laws provided that any member who should wilfully violate the charter and by-laws, or be guilty of a fraudulent breach of contract, might be expelled. A member of the association was charged with obtaining goods

England, 2 Bingham, 393; Evans v. Phila. Club, 50 Pa. St. Phila. Club, 50 Pa. St. 107. See State 107.

v. Tudor, 5 Day, 329; Society v. Com., 52 Pa. St. 125; Roehler v. Mechanics' Aid Soc., 22 Mich. 86; Hopkinson v. Exeter, L. R. 5, Eq. 63; Com. v. St. Patrick Soc., 2 Binn. 448.

¹ Evans v. Phila. Club, 50 Pa. St. 107.

² Com. v. Pike Beneficial Soc., 8 Watts & Serg. 247; Black, etc., Soc. v. Vandyke, 2 Whart. 309; Society, etc., v. Com., 52 Pa. St. 125.

by false pretences, and the offence was proved. The trial was had in conformity with the rules and regulations of the association, the accused having been duly notified. It was held that the board of managers did not exceed its powers or violate any rule of law in regularly expelling the member, and the claim of a right to a trial by jury, on the ground that the complaint was of a criminal nature, was not sustained.¹ The purposes of the New York Board of Fire Underwriters were declared to be, among other things, "to establish and maintain uniformity among its members in policies or contracts of insurance." A by-law was adopted providing that the board might establish or alter rates of premiums for insurance, and that such rates should be binding on all the members. The relator violated certain rates of insurance which had been thus established, and, for this, the offending company was expelled from membership in the board. It was held that as the board was an organization formed for the proper transaction and management of the business of insurance by its members in a uniform manner, the corporation necessarily possessed the power of expulsion over its members who violated its rules and regulations in this respect, and that the only restraint imposed upon the enactment of by-laws with that object was, that they should contain nothing in conflict with the charter, or with the laws or constitution of the State or of the United States.² The prayer of a bill was that the Massachusetts Medical Society might be enjoined from taking any further proceedings for the trial of the plaintiffs, and from expelling or attempting to expel any of them from the society for any of the causes mentioned in the notice. The charges against the plaintiffs were that they had been guilty of conduct unbecoming and unworthy of honorable physicians and members of the society. It was held on demurrer, that the section of the act

¹ People v. N. Y. Com. Assoc., 18 Abb. Pr. 271.

² People v. N. Y. Board of Underwriters, 7 Hun, 248.

of incorporation which provided that the fellows of the society might from time to time elect such persons to be fellows as they should judge proper, and should have power to suspend, expel, or disfranchise any of them conferred upon the society a special and limited judicial power, and that the court of chancery had no more power over the proceedings than over proceedings of courts of general jurisdiction.¹ Where one of the rules of a club provided for the expulsion of a member on a vote of two-thirds of those present at the meeting, it was held that every member had contracted to abide by the rule; that the discretion must not be capriciously or arbitrarily exercised, but that if action had been taken *bona fide* without any improper motive, it was a judicial decision from which there was no appeal. The court remarked that none but the members of the club could know the details which were essential to the well-being of such a society, and it must be a very strong case that would induce the court to interfere.²

What a person agrees to when he becomes a member of a board of stockbrokers is that the board may take jurisdiction when he refuses to comply with his stock contracts, not that it shall do so in relation to contracts touching other interests. When a party's right of membership is threatened by an unauthorized proceeding, a court of equity will grant an injunction restraining the board from investigating or adjudicating the matter.³ A legislature which assumes, without judicial finding, that certain trustees of a public corporation have forfeited their petition, declares vacancies, and proceeds to fill them, has for its object the removal of such trustees by direct legislation, and its acts are illegal and void. It may not be strictly a bill of attainder, yet it is in the nature of such a bill, is equally unjust and odious,

¹ Gregg v. Mass. Medical Soc., 111 Mass. 185.

² Hopkinson v. Exeter, L. R. 5, Eq. 63. Per Lord ROMILLY, M. R.

³ Leach v. Harris, 2 Brewster Pa. 57.

and is unknown in the jurisprudence of this country.¹ A by-law of a medical society that any member who shall be guilty of ungentlemanly conduct during a session of the society, or who shall conduct himself out of the society in such a manner as would have rendered him ineligible to membership, shall be expelled from the society, is proper in view of the objects of the society; but the society has not an uncontrollable discretion with reference to the construction and enforcement of the by-law. It cannot, under pretext of enforcing such a rule, take personal or private revenge, or make the occasion an instrument for religious intolerance or political proscription. And when a member has been deprived of membership by the illegal action of the society, he is entitled, in case he has no other remedy, to a peremptory mandamus compelling the society to restore him to all his rights and privileges as a corporator.²

When the charter provides that the corporation shall have the right to admit and expel members, it is a power conferred on the body of corporators, and they cannot by a by-law delegate the power to a board of directors.³

§ 311. Ground for expulsion of members.—Without an express power in the charter, a person cannot be disfranchised unless he has been guilty of some offence which either affects the interests or good government of the corporation, or is indictable by the law of the land.⁴ By the articles of a society, the being concerned in scandalous proceedings

¹ State v. Adams, 44 Mo. 570. But the action of the legislature pending the Southern rebellion in taking measures to remove from the management of corporations of a public nature those who came within the purview of what was commonly called the convention oath, which was an oath of loyalty in disclaiming hostilities in the past, and promising future fidelity, is not a violation of the contract embraced in the

charter of a corporation, for fidelity to the State is embraced in every such contract. *Ibid.*

² State v. Georgia Medical Soc., 38 Ga. 608.

³ State v. Chamber of Commerce, 20 Wis., 63; Green v. African M. E. Soc., 1 Serg. & Rawle, 254.

⁴ Com. v. Patrick Soc., 2 Binn. 441; Leech v. Harris, 2 Brewster, 571; People v. Chicago Board of Trade, 45 Ill. 112.

which might injure its reputation, was named as a cause for expulsion. It was held that altering a physician's bill, which the prosecutor alleged he had paid, from four dollars to forty dollars, was such a proceeding, and a rule to show cause was discharged. It is immaterial that the minutes of the expulsion do not state that the proceeding injured the reputation of the society.¹ When the charter provides that the corporation shall have the right to admit or expel such persons as it may see fit in the manner prescribed by the rules, regulations, or by-laws, the terms are so general as to leave the causes of disfranchisement in the discretion of the corporation, subject only to the rules, regulations, and by-laws. The discretion, however, is not purely arbitrary, but can be exercised only for some just and reasonable cause. A by-law of a board of trade that failure to comply promptly with the terms of a contract shall be sufficient ground for suspension from the privileges of membership, until such contract is equitably or satisfactorily arranged or settled, is not unjust or unreasonable. The controlling consideration in such cases is, the nature and purpose of the corporation. A by-law which is clearly alien to the nature of the corporation, and a departure from its purpose, will of course be *ultra vires* and void.² An act to incorporate medical societies authorized them to make such by-laws relative to the admission and expulsion of members as a majority of members at their annual meetings should think fit and proper. The medical society of the county of Erie established a tariff of minimum prices for medical services, and the relator for persisting in charging less than the price fixed was, by a vote of the members of the society, expelled. It was held that the regulation was not a legitimate object of the corporation; that the rule was an unreasonable one, not because the prices agreed on were un-

¹ Com. v. Philanthropic Soc., 5 Binn. 486.

² People v. Chicago Board of Trade, *supra*.

reasonable, but that the rule itself unreasonably restrained and oppressed the members by interfering with their private rights; and that in conflict with well-settled principles of law, and with public policy; that the disfranchisement of the relator was therefore unauthorized and illegal; and that a mandamus would issue to compel his recognition as a member of the society.¹ The defendant was incorporated under a general act for the incorporation of benevolent, charitable, scientific, and missionary associations. One of its by-laws provided that a member was bound to receive the holy sacraments twice a year, and that without this, he should not be regarded as a member. This regulation was held invalid as not authorized by the statute under which the corporation was organized; as against the general policy of the laws of the State; as unreasonable; and as being in conflict with the constitution of the State, which declared: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind."² A., the relator, brought an action against B. to recover an amount which he alleged B. owed him. B. set up a counter-claim and subsequently preferred a complaint before a committee of the Chamber of Commerce for the amount he, B., claimed. A., refusing to submit the matter to the arbitration of the committee, it proceeded *ex parte* in his absence, and, having found that A. was indebted to B. in a large sum, the board of directors suspended

¹ People v. Medical Society, 24 Barb. 570.

² People v. St. Franciscus Benevolent Soc., 24 How. Pr. 216. In this case the court said: "The defendant is possessed of property and funds in which the relator has an interest; the law protects that interest, and he cannot be deprived of his rights by an unauthorized by-law though he may have as-

sented to it. The society might refuse to admit any one to membership, and such person would have no remedy. But once admitted, he will have all the rights and privileges provided by the charter under the statute; and the charter or articles of incorporation can contain no provision in conflict with the statute."

A. from the privileges of membership until the indebtedness should be equitably settled. It was held that the refusal of A. to submit his claim to the committee was not a violation of his duty to the corporation, especially as to have done so would have been a discontinuance of the suit in the court, which the corporation, even if it had had concurrent jurisdiction, could not have compelled him to do.¹

Mere breaches of good manners may be disorderly and injurious, and fit to be visited by reprimands and fines, but they are not such offences against corporate duty as to forfeit the franchise.² A by-law, however, of a charitable institution for the benefit of aged and indigent seamen, that leaving the institution without permission of its governor, or boisterous and disorderly conduct at the table, shall cause the offender to forfeit the benefits of the institution, and he shall be expelled, is reasonable and consistent with the administration of the charity which the founder had in view.³

§ 312. Proceedings upon removal of members.—The members of a corporation cannot be expelled upon charges made against them until they have an opportunity to be heard in their defense.⁴ Where the charter of an academy authorized the trustees to exercise the powers usually conferred on corporations, with power to fill vacancies caused by the death or removal of any member, and to displace or supersede all persons appointed by or under the corporation, it was held that this did not give them the right of removal in their discretion without inquiry or conviction.⁵ The articles of organization of a corporation provided that

¹ State v. Chamber of Commerce, 20 Wis. 63.

² Evans v. Phila. Club, 50 Pa. St. 107. Affirmed by an equal division of the court in banc.

³ People v. Sailors' Snug Harbor, 5 Abb. Pr. N. S. 119; 54 Barb. 532.

⁴ People v. St. Franciscus Benevolent Society, *supra*.

⁵ Fuller v. Academic School, 6 Conn. 532; Com. v. Pennsylvania Beneficial Inst., 2 Serg. & Rawle, 141.

its affairs should be conducted by a board of five directors who were stockholders, and that any member of the board might be removed from office and the vacancy filled at any meeting duly called for that purpose by any number of stockholders whose shares constituted a majority of the stock subscribed. H., who was permitted to take the record book of the corporation to obtain additional subscriptions to the capital stock, procured nominal subscriptions, his avowed object in doing so being to enable him and his friends to get control of the corporation. He then caused an irregular notice to be delivered to certain of the stockholders of a meeting to be held for the purpose of removing from office the then directors. On a bill praying that the defendants be enjoined from attempting to remove the existing directory, it was held that an injunction could not be granted; that if the meeting, which was feared, should convene, its proceedings would be void because of the irregularity of the notice; and that the persons, who it was claimed were only nominal subscribers, could not be ejected from the corporation without being heard.¹ The act incorporating the Vincennes University provided that the places of any of the trustees who should resign, remove from the Territory, die, or wilfully absent himself from three stated meetings, should from time to time be supplied by the board of trustees at their stated meetings. It was held that the failure of particular members to attend as required, would not *per se* vacate their seats, nor would their removal from the State do so. These acts would be a ground on which the remaining trustees might vacate the seats of such absent members by electing others in their places. But if no such election took place, the negligent members could still appear in their seats as trustees, and if recognized as such by their colleagues, their acts would be valid. Simple absence from three meetings was not by the

¹ Southern Plank R. Co. v. Hixon, 5 Ind. 165.

charter a cause for vacating the seat of a member, but wilful absence, and this would present a question to be tried on an attempt of the remaining trustees to insist on a vacancy for such cause.¹ Where power to expel one of the inmates of a benevolent institution is given by the charter to the board of trustees, or at least to such of them as compose the executive committee, the accused should have reasonable notice of a proposed examination into the charges against him and an opportunity to be heard in his defense; and the proceedings of the trustees in investigating such a charge is subject to reviewal by the court.² By an article of a society it was provided that no member should be expelled without first having a copy of the charges against him certified and delivered at his residence at least twenty-four hours previous to the hearing, and that in case of his neglect to attend, he should be considered guilty and be ex-

¹ State v. Vincennes University, 5 Ind. 77.

² People v. Sailors' Snug Harbor, 5 Abb. Pr. N. S. 119; 54 Barb. 532. Where the by-laws of an incorporated club provide that if a member shall remain in default for dues fifteen days after being posted he shall forfeit his membership in the club unless he make an explanation which is satisfactory to the board of management, the fact that a member is so in default does not *ipso facto* forfeit his membership. And if the board of management upon such failure resolve that the delinquent has ceased to be a member, and no declaration of forfeiture is passed by the board, a writ of mandamus will be issued to the board of management commanding it to cause the name to be replaced upon the roll of members until the matter is determined in the manner directed by the constitution and by-laws of the club. Sibley v. Carteret Club, 40 N. J. 295. One Seibert was excommunicated by the con-

sistory of a church to which he belonged, which excommunication he claimed was not in accordance with the constitution of the society, and he prayed for a mandamus compelling the society to reinstate him. The church judicatories consisted of three heads: the consistory, the classis, and the synod. The charter provided that when any member thought himself aggrieved by the decision of a lower judicatory, he was entitled to an appeal to a higher one; and that whatever was concluded in such judicatory by a majority of votes, should be deemed valid and binding, unless it could be shown to be contrary to the word of God and the constitution of the church. It was held that if the relator was injured by the decree of the consistory, his remedy was by appeal to a higher ecclesiastical court, and that until a final adjudication by the church judicatories, he was without a remedy by mandamus. German Ref. Church v. Seibert, 3 Pa. St. 282.

elled. The delivery of the copy of the charges was made less than twenty-four hours before the trial, and the expulsion took place in the absence of the accused. It was held that the omission to notify the plaintiff according to law rendered the expulsion invalid, notwithstanding the secretary of the society offered to prove that the plaintiff waived all irregularities in the notice at the time of its service and that he promised to attend the meeting.¹ The constitution of a society provided that if any member should be found guilty of slander or fraud against the society, it should have power either to fine or expel him, and that in every such case a committee of five should be appointed to hear and determine the offence. It was held that the word "slander" must be regarded as meaning some substantial offence against the society, and that its records must show on their face the exact cause of the expulsion and all of the proceedings essential to authorize its action.²

Where the reasons for the removal of a member are re-

¹ Washington Beneficial Soc. v. Backer, 20 Pa. St. 425. A corporation, when passing upon the rights of its members, is a court, and it is a fundamental principle of law that no one shall be condemned or prejudiced in his rights without an opportunity of being heard. When, therefore, the name of a member is stricken from the books of the corporation without notice, a mandamus will issue to the corporation commanding it to restore him to the rights of a corporator or show cause to the contrary. Delacey v. Neuse River Nav. Co., 1 Hawks, 274. A member of a fire company cannot be dropped from the active and placed on the contributing roll for not attending to specified duties in violation of a by-law without a trial, of which he must have had notice. Ridgell v. Harmony Fire Co., 8 Phila. 310.

² Roehler v. Mechanics' Aid Soc., 22 Mich. 86. One of the purposes of the New York Cotton Exchange was to settle within itself controversies between the members, and each member bound himself, upon signing the constitution, to abide by all of the rules, by-laws, and regulations of the association. The association being about to sell a membership on the ground that it did not belong to the claimant, he obtained an injunction restraining the sale, and for thus applying to the court, he was expelled. It was held that when the member refused to submit to the report of the association against his title, he was not acting in antagonism to its power to adjust controversies between its members and to establish just and equitable principles in the cotton trade, but simply exercising a legal right. People v. N. Y. Cotton Exchange, 15 N. Y. Supr. Ct. 216.

turned, the return must set out all the necessary facts precisely, in order to show that the person was removed in a legal and proper manner and for a legal cause, and it is not sufficient to set out conclusions only. If a select number of a corporation have power to remove members, and propose to do so at a meeting held on a day not directed by the charter, all who are within reach must be summoned, and that this was done must be expressly alleged.¹

§ 313. Removal of members of unincorporated societies.—The reasons applicable to the expulsion of members by corporations, do not apply to a voluntary unincorporated body which comes into existence by the mutual agreement of the persons forming it, and is thereafter carried on under regulations which the body adopts for its government. A member of a corporation is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute, or derived from immemorial custom which implies the existence of a grant, and it can neither be taken away nor withheld by the act of the corporation, except in certain extreme cases. But in an unincorporated voluntary association, the privilege of membership is not given by statute, but is created and conferred by the organization itself. The law cannot compel such a body to admit an individual to membership, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which it is

¹ *Rex v. Liverpool*, 2 Burr. 723; *Com. v. German Soc.*, 15 Pa. St. 251. When the object of a corporation is stated in its charter to be to give assistance to its sick members, and, in case a member dies, to have him buried free of charge, for a member to feign sickness or to deceitfully draw relief after recovery, is an offence subversive of the fundamental objects of the association. A return to a writ of mandamus should set forth distinctly, and not argumentatively, inferentially, or evasively, all of the material facts, both as to cause of disfranchisement and the proceedings. *Society, etc., v. Com.*, 52 Pa. St. 125. There is no case which upholds mere technical objections on the return to the mandamus; they should be urged *in limine* on a motion to quash. *Fuller v. Plainfield Academic School*, 6 Conn. 532.

made to depend. Voluntary bodies of this kind will, however, be held to the fair and honest administration of the regulations which are in force when a proceeding to remove a member is instituted against him; but when an expulsion of a member is in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere.¹ Courts never interfere to control the enforcement of the by-laws of merely voluntary associations created for the furtherance of religious, moral, or social principles, or for amusement.² A member of a private beneficial society brought suit for a benefit to which he claimed he was entitled, though the society after regularly trying the case according to its by-laws, had decided against him. It was held that he was concluded by the decision of the society, and that the court had no jurisdiction to render judgment contrary thereto.³

When a voluntary society becomes incorporated, its legal responsibilities are changed by the acceptance of the charter. While it remained a voluntary society the courts had no jurisdiction over it if it violated no statute of the State, and its members had no property in their membership which the law could protect. But when the society accepted a charter, it became a private civil corporation, the corporators then in being acquired a property in the franchise, and every person who afterward became a member acquired a like property of which he could not be deprived without due process of law.⁴

¹ White v. Brownell, 2 Daly, 329. For the purpose of ascertaining whether the proceedings upon a suspension were regular, and in accordance with the constitution and by-laws, the court will entertain the case. *Ibid.*

² People v. Board of Trade, 80 Ill. 134. See Leach v. Harris, 2 Brewster, 57; Fischer v. Raab, 57 How. Pr. 87; Hyde v. Woods, 2 Sawyer, 655; 94 U. S. 523.

³ Anacosta Tribe v. Murbach, 13 Md.

91. An honorary member of a fire company loses none of his rights by not participating in the affairs of the company, and he will cease to be such only by resignation or expulsion. The forfeiture of membership must be declared by the proper authority and in the proper manner, otherwise it will be without force or effect. *Harmstead v. Washington Fire Co.*, 8 Phila. 331.

⁴ *State v. Georgia Medical Soc.*, 38 Ga. 608.

§ 314. Waiver of objection to proceedings in amotion or disfranchisement.—When the person removed was before the body that removed him previous to the passage of the resolution of removal, was heard by the corporation in his defense, and interposed no objection to the question of removal at that time, the regularity of the proceeding is not open for further consideration.¹ Although the action of a corporation may have been arbitrary and illegal in adopting an amendment to the constitution declaring certain causes for forfeiture of membership, and in dropping a member's name from the roll, yet he can accept such action. There must be some period of time at the expiration of which knowledge of the facts and acquiescence therein will be a ground to deny a mandamus, which is a discretionary remedy. Nineteen years' delay in asserting a member's rights were considered by the court a sufficient reason for refusing to issue the writ.² The expression of approval or consent to the union of two religious bodies by a member of one of them by voting in favor of and taking part in the formalities attending such union, does not *ipso facto* deprive him of membership in his church, and of his right to sit and act in its assemblies. If the discipline of the church forbids such a connection with another body, until the discipline is applied by an expulsion of the offender, his position and legal rights remain unaffected.³

¹ People v. Higgins, 15 Ill. 110.

² Bostwick v. Detroit Fire Department, 49 Mich. 513.

³ People v. Farrington, 22 How. Pr. 294. The acts of the members composing a Grand Lodge, in declaring the society dissolved, were held to amount

to an express declaration that they would serve no longer, and to be a voluntary and avowed abandonment of the charter and of the society, and that they were bound by it. Smith v. Smith, 3 Dessaus. 557.

CHAPTER XVIII.

RIGHT OF CORPORATION TO SUE, AND LIABILITY TO BE SUED.

<p>§ 315. General power of corporations to maintain suits. 316. Suits for salvage. 317. Right of corporation to sue in another State or country. 318. Bill in equity by corporation for the protection of its rights. 319. Suit by stockholder for protection of corporate interests. 320. Suit by and against a stockholder individually. 321. Suit by minority of shareholders.</p>	<p>§ 322. Suit by stockholders against directors and officers. 323. Bill in equity against corporation by third persons. 324. Liability of corporations to actions on contract. 325. Liability of corporations to actions for torts. 326. Suits against foreign corporations. 327. Suits in the United States courts.</p>
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§ 315. General power of corporations to maintain suits.— The right and capacity to sue and be sued is an incident to bodies politic of all descriptions, even to those which have been incorporated by and are located in another State or in a foreign country;¹ a corporation being deemed, for the purposes of a suit, a person.² It has been well said that “they may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompence for any injury that can be done to them; and that all such actions may be maintained against them as are necessary to enforce the claims of others in opposition to them.”³

¹ *McKim v. Odom*, 3 Bland's Ch. 407.

² *Eslava v. Ames Plow Co.*, 47 Ala. 384. When a corporation is a party to an action it may lawfully take any step that an individual could under like circumstances to bring it to final

judgment, among which is a trial by arbitrators appointed by the court with the consent of both parties. *Alexandria Canal Co. v. Swann*, 5 How. 83. ³ *I Kyd on Corp.* 185. See *Lyme v. Henley*, 1 Scott, 29; *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 230;

A corporation created by a State to perform its functions under the authority of the State, and only suable there, though it may have members out of the State, is a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled for the purposes of suing and being sued, to be deemed a citizen of the State.¹ The authority given by an act to a corporation to sue and be sued, is subject to the qualification that it must be exercised in relation to some matter within the scope of the statute and legitimate purpose of the corporation.² In the absence of proof that a suit was not authorized by a corporation, the court will presume that it was properly instituted; and this will be the case although the corporation is a nominal party only. Where men, who are at work under the direction of the president of a corporation, are unlawfully inter-

Ashby v. White, 2 *Ld. Raym.* 953; *Winsmore v. Greenbank*, Willes, 577; *South Royalton Bank v. Suffolk Bank*, 27 *Vt.* 505; *Goodspeed v. East Haddam Bank*, 22 *Conn.* 530. If in consequence of an injury to one of the members the corporation sustains damage, it is entitled to an action on that account. 1 *Kyd on Corp.* 190. It is the duty of a church corporation or its trustees to bring actions of trespass, or on the case when required by the interests of the church, and to protect its members in the enjoyment of their religious rights and property. *First Baptist Church v. Schenectady*, etc., *R.R. Co.*, 5 *Barb.* 79. When the act respecting attachments requires an affidavit from the applicant, the affidavit may be made in behalf of the corporation by a duly authorized agent, who is possessed of the requisite knowledge for the purpose; the law which gives existence to the corporation, and allows it to sue and be sued, necessarily conferring on it authority to perform through its agents such incidental ser-

vices. *Trenton Banking Co. v. Haverstick*, 6 *Halsted N. J.* 171.

¹ *Louisville, etc., R.R. Co. v. Letson*, 2 *How.* 497.

² *Ancient, etc., Club v. Miller*, 7 *Lansing*, 412. An act which authorizes the forming of corporations does not allow their formation for the purpose of instituting actions to recover penalties for violations of game laws, unless the act expressly so specifies. *Ibid.* A corporation has only such rights and powers as are expressly granted by its charter, or as are necessary to carry into effect the rights and powers so granted. *N. Y. Firemen's Ins. Co. v. Ely*, 5 *Conn.* 560. Where the charter of a mutual fire insurance company provides that the directors shall "settle and determine" the respective proportions of a loss to be paid by the several members of the company, the directors cannot legally delegate such authority to a committee composed of a minority of their own board. *Monmouth Mut. Ins. Co. v. Lowell*, 59 *Me.* 504.

ferred with, the court will assume that the corporation authorized the work, and, consequently, that the corporation has the right to bring an action for the interference.¹ The trustees of school lands, although not incorporated by a particular name, are nevertheless *quasi* corporations, and when they sue, they must prove under the general issue that they are a corporation. Like all corporate bodies, they possess only such powers as are given them by law, and are subject to the rules governing corporations.² Although an act of incorporation authorizes a special remedy, such, for instance, as charging and collecting toll upon lumber by a boom company, yet the company can maintain assumpsit on an express contract to pay for services rendered.³ Where a corporation purchased certain property for a purpose which was beyond the limits of its powers, but to which neither the stockholders nor the State objected, and it afterward sold the same property, it was held that the fact that in purchasing the property it had exceeded its corporate powers, did not under the circumstances constitute a defense to an action brought against the party to whom it sold to recover the price agreed to be paid, and for repairs made by the corporation upon the property at the request of such party.⁴ Actions of book account can be maintained both in favor of and against corporations of almost every character, public and private.⁵

An action may be maintained by a corporation aggregate for words falsely and maliciously spoken or written of it in the way of its trade or business, or of its property and con-

¹ Bangor, etc., R.R. Co. v. Smith, 47 Me. 34. In an action on a note, general reputation that the plaintiff is conducting business as a corporation, coupled with the fact that the note mentioned in the complaint is payable to the plaintiff, is sufficient evidence to prevent a dismissal of the complaint.

Holmes v. Gilliland, 45 Barb. 568, SUTHERLAND, J., dissenting.

² Carmichael v. Trustees, etc., 3 How. Miss. 84.

³ Kidder v. Boom Co., 24 Pa. St. 103.

⁴ Rutland, etc., R.R. Co. v. Proctor, 29 Vt. 93.

⁵ Vermont Mu. Ins. Co. v. Cummings, 11 Vt. 503.

cerns, or of its officers, servants, or members by reason of which special damage is sustained by it.¹ A corporation engaged in a business in which credit may be material to success, may maintain an action for libel without proof of special damage, where the language used concerning it is defamatory in itself, affects its credit, and necessarily and directly occasions pecuniary injury. But in all other cases the averment and proof of special damage are necessary.²

The right of the corporations of one State to sue in the courts of another State, depending as it does upon the comity of nations, does not extend to a case which is contrary to the known policy of the State in which it is sought to bring the action, or which would be injurious to its interests.³ A corporation cannot maintain an action in a foreign State, which it could not by the terms of its charter maintain in the State which created it; or an action as a trustee which it could not maintain if it were suing in its own right.⁴

¹ Trenton Mut. Life & Fire Ins. Co. v. Perrine, 3 Zab. 402; Hannemannian Ins. Co. v. Beebe, 48 Ill. 87; Shoe & Leather Bank v. Thompson, 23 How. Pr. 253; Knickerbocker Ins. Co. v. Ecclesine, 42 Id. 201; 11 Abb. Pr. N. S. 385; 34 N. Y. Superior Ct. 76.

² Knickerbocker Life Ins. Co. v. Ecclesine, 6 Abb. Pr. N. S. 9. The question whether a publication calculated to affect the value of stock in a bank, and in that way to injure its business reputation, is libelous or not, is to be determined from the market value of the stock, and not by examining the assets and liabilities of the bank. Brennan v. Tracy, 2 Mo. App. 540.

³ Corporations may, by the comity of nations, make contracts in other States than the one by which they are created, establish agencies there, and enforce such contracts in the courts, unless excluded from so doing by express statute,

or unless it is against the policy or interest of the State. Williams v. Criswell, 51 Miss. 817.

⁴ Am. Colonization Soc. v. Gatrill, 23 Ga. 448. But where statutes are enacted intended to preserve rights of action, and to furnish an effectual remedy to those entitled to them, they may extend the limits of the State enacting them to assignees holding claims from corporations. Stetson v. City Bank of New Orleans, 2 Ohio St. 167. A statute which provides that any corporation may at any time after its dissolution prosecute any suit at law or in equity by the corporate name for the use of the party entitled to receive the proceeds of any such suit, in the same manner and with the like effect as if such corporation were not dissolved, is applicable to foreign as well as to domestic corporations. Ibid.

§ 316. Suits for salvage.—A corporation is not disqualified from maintaining a suit for salvage, there being no reason why the same rule should not be applied to corporations as to individual owners of ships and vessels similarly employed and exposed; and although the net profits are divided among the stockholders, a service in its nature, otherwise one of salvage, will be held to be a salvage service, and the corporation be entitled accordingly.¹

§ 317. Right of corporation to sue in another State or country.—The rights and obligations under contracts valid at the time and place of their inception do not depend on the residence of the parties, but follow and attend them wherever they may go, the only limitation being that each country will refuse to execute contracts which are contrary to the policy of its own laws; and corporations, being artificial persons, have the same capacity to contract and acquire rights in their corporate name and character and to enforce those rights in the courts as natural persons.² There is nothing in the organization of corporations which should deprive them of the comity of collecting their debts by suits in another State than that of their creation, and of holding property therein as security for their debts or in payment of them.³ It is, therefore, well settled that a corporation created by one government may sue in the courts of another unless prohibited by a statute of the latter.⁴ A statute which prevents an unincorporated company

¹ The Camanche, 8 Wall. 448; The Blackwell, 10 Id. 1. See Building Assoc. v. Anderson, 7 Phila. 106.

² Bank of Marietta v. Pindall, 2 Rand. Va. 465.

³ N. Y. Dry Dock v. Hicks, 5 McLean, 111.

⁴ Henriques v. Dutch W. I. Co., 2 Lord Raymond, 1532; Bank of Edwardville v. Simpson, 1 Mo. 184; Bank of Wishtenaw v. Montgomery, 2 Scam.

Ill. 422; Frazier v. Wilcox, 4 Rob. La. 517; Ganga Iron Co. v. Dawson, 4 Blackf. 202; New Jersey, etc., Bank v. Thorp, 6 Cowen, 46; British Am. Land Co. v. Ames, 6 Metc. 391; Newburg Petroleum Co. v. Weare, 27 Ohio St. 353; Hibernia Nat. Bank v. La-

combe, 84 N. Y. 367; Leisure v. Union Mut. Life Ins. Co., 91 Pa. St. 491; Lycoming Fire Ins. Co. v. Langley, 62 Md. 196; Dodge v. City of Council

from maintaining an action in certain cases is coextensive with the limits of the State, and applies to all companies, agencies, officers, or associations assuming to act in the State by virtue of a charter obtained in another State; for as such agencies have no corporate powers beyond the limits of the State in which they are created, it follows that in a foreign State they are as much unincorporated as if they had assumed to act without color of authority.¹ *Prima facie* a foreign corporation may sue on a note in another State, the same as a domestic corporation or natural person. Where in such an action it appears that the corporation was created to effect insurance on lives, and that the

Bluffs, 57 Iowa, 560; Williams v. Creswell, 51 Miss. 817; Christian Union v. Yount, 101 U. S. 352. In *Augusta v. Earle*, 13 Pet. 519, Chief Justice TANEY said: "We think it is well settled that, by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well-known and long-continued usages of trade, the general acquiescence of the States, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving this proposition." Foreign corporations may sue in New York in their corporate name, and may prove as a matter of fact, if the same is denied, that they are lawfully incorporated; and they may file a bill for the sale of land in the State under a mortgage taken to secure money lent in another State. *Silver Lake Bank v. North*, 4 Johns. Ch. 370. But where a foreign corporation kept an office in New York for receiving deposits and discounting notes, without being expressly authorized to do so, the laws of

the State prohibiting such business without authority, it was held incapable equally with a domestic corporation of maintaining an action for the money loaned either on notes or other security. *New Hope, etc., Bridge Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648. In Massachusetts a foreign corporation may maintain an action for the recovery of its dues, or for damages done to its chattels. When it has a demand against a citizen of the State, it may take a mortgage of its debtor's real estate as security, and may thereby acquire the same rights as other mortgages. *Am. Mu. Life Ins. Co. v. Owen*, 15 Gray, 191. A corporation created by the laws of another State can sue in Alabama upon a contract made in that State. *Tombigbee R.R. Co. v. Kneeland*, 4 How. 16. Foreign corporations may open an office in the District of Columbia for the transaction of business, and make contracts upon which they may sue for their violation in the courts of the District, if the contract is made and violated there. *Weymouth v. Washington, etc., R.R. Co.*, 1 McArthur, 19.

¹ *Atterbury v. Knox*, 4 B. Mon. 90.

note was given for the premium on a policy of insurance, it will be presumed, until the contrary appears, that the insurance was such as the company was authorized to make, and that the note is legal.¹

Whether a corporation is entitled to take title to land in a State other than the one in which it was incorporated, depends first upon the laws of the State in which it was incorporated, and second upon the laws of the State in which the land lies. A corporation has no powers or capacities which are not expressly or by implication given it by the laws of the State in which it is created. But it may be restricted in its power to hold real estate in the State where it is created, without any such restriction being placed upon it by its charter with reference to another State. Although a corporation is but an artificial person, the legal existence of which is confined to the State that has created it and endowed it with its powers, capacities, and rights, which it can exercise in another State only by the permission express or implied of the sovereignty of the latter, yet the mere right of a corporation to purchase and sell property not being in its nature strictly a franchise, will be recognized and protected in another State, subject only to the qualification that the enjoyment and exercise of such right be not contrary to the laws or settled policy of the State, or prejudicial to its interests or those of its citizens. With these limitations, the right of a corporation created in one State to make and enforce contracts, acquire property, and transact business (not requiring the exercise of official corporate action, or of franchises, within the State), is as clearly recognized and as generally enforced in another State as the individual rights of an inhabitant of one State are recognized and enforced in another State of which he is a non-resident, and upon the same principle of the comity of nations, which comity is not that of the courts, but of

¹ Mutual, etc., Life Ins. Co. v. Davis, 12 N. Y. (2 Kern.) 569.

the State. The power of determining the question whether and how far, with what modification or upon what condition, the laws of one State, or any rights dependent upon them, shall be recognized in another State, belongs to the law-making power, the judiciary being guided in its decision by the principle and policy adopted by the legislature. When a corporation is created in one State with power, so far as that State can give it, to take, hold, and convey land in another State, an affirmative enabling act is not necessary to give it capacity to exercise the right in the latter State, such capacity resting upon the same principles of comity as its capacity to make and enforce contracts, or to acquire, hold, and convey personal property. Unless the constitution or the legislature either expressly or by clear implication declares a contrary rule, the courts of a State are bound to recognize the right of a corporation of another State to collect the debts due it by receiving a conveyance of land in the former State.¹

An action brought in a foreign State on a contract entered into by a corporation in the State where it is domiciled will be decided by the laws governing the contract in the State of its domicile.² If a corporation created in a

¹ Thompson v. Waters, 25 Mich. 214, per CHRISTIANCY, J.,—CAMPBELL, J., dissenting; Cowell v. Springs Co., 100 U. S. 55. When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation which does not concern third parties. *Ibid.*

² Baltimore, etc., R.R. Co. v. Glenn, 28 Md. 287. The powers of a corporation are to be determined by the laws of the State by which the corporation is created; and acts are deemed by the courts valid which are so by such foreign law, though they would be held

without the power of the corporation by the law of the State in which the action is brought. O'Brien v. Chicago, etc., R.R. Co., 4 Abb. Pr. N. S. 381. In an action against a corporation brought in the State of its creation on a contract entered into by it in a foreign State, it will be liable in like manner and to the same extent that it would if the contract had been made with citizens of the State where it is established. For when a corporation goes into a foreign State, and enters into a contract with the citizens of that State, it does not exercise a power derived from the law of the place of the contract, but of that of the place of its creation. To this extent, the *lex loci*

foreign country sue in our courts, a war between the two countries pending the suit, will not defeat the action, unless it appear on the record that the plaintiff is not within the exceptions which enable an alien enemy to sue, there being no legal difference as to the plea of "alien enemy," between a corporation and an individual. In Soc. for Prop. of Gospel v. Wheeler,¹ Judge STORY, in considering the objections to permitting a corporation created in a country at war with the United States to maintain suits here, said : "Where a corporation is established in a foreign country by a foreign government, it is undoubtedly an alien corporation, be its members who they may ; and if the country become hostile, it may, for some purposes at least, be clothed with the same character ; even in respect to mere municipal rights and duties, an aggregate corporation has been deemed to have a local residence. It may, therefore, acquire rights and be subject to disabilities arising from the country, if I may so express myself, of its domicile. And, indeed, upon principle or authority, it seems to me difficult to maintain that an aggregate corporation, as, for instance, an insurance company, a bank, or a privateering company, established in the enemy's country, could merely, from its being an invisible, intangible thing, a mere incorporeal and legal entity, be entitled to maintain actions to enforce rights, acquire property, or redress wrongs, when its own property on the ocean would be good prize of war. If the reason of the rule of the disability of an alien enemy be, as is sometimes supposed, that the party may not recover effects which, by being carried hence, may enrich his country, that reason applies as well to the case of a corporation as of an individual in the hostile country. . . . It has been argued

contractus does not apply. The case would be different if the suit were brought for the purpose of enforcing a liability created by the charter of a foreign corporation against stockholders

residing where the suit is brought. Hutchins v. New England Coal Mining Co., 4 Allen, 580.

¹ 2 Gallison, 105.

that the court will look to the purposes for which the corporation was instituted, and to the conduct which it observes, and that, if these be innocent or meritorious, they afford an exception from the general rule. But it is not the private character or conduct of an individual which gives him the hostile or neutral character. It is the character of the nation to which he belongs, and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion, and humanity, and yet his domicile will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavor by all lawful means to assuage or extinguish it, and yet, while he continues in the country, he is known but as an enemy. The same principle must apply in the same manner to a corporation. The objects, indeed, of the present corporation are highly meritorious and worthy of public favor. But upon the doctrines of law, it must be deemed a British alien corporation, and, as such, liable to the imputation of being an enemy's corporation, unless it can be protected upon other principles." On the other hand, however, the same judge said: "Another consideration derived from the express provision of the 9th article of the British treaty of 1794 ought not to be omitted. The article stipulates that British subjects who then held land in the territories of the United States, and American citizens who then held land in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell, and devise the same to whom they please in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be regarded as aliens. This article has never been annulled, and therefore remains in full force. It deserves and ought to receive a liberal and

enlarged construction. There can be no doubt that corporations as well as individuals are within its purview, and the present claim not only may be, but in fact is one which it completely embraces. . . . Looking to the general moderation with which the rights of war are exercised in modern times under the policy if not the law of nations, perhaps it would not seem an undue indulgence to hold that, as to all titles and estates within the article, an alien enemy may well maintain all the legal remedies as in time of peace. At least it cannot be presumed that in this favored class of cases the party has not received the license or safe conduct of the government to pursue his rights and remedies during the war. And, unless such presumption can be made when there are no facts on the record to warrant it, the plaintiffs must be entitled to judgment."

§ 318. Bill in equity by corporation for the protection of its rights.—A corporation in possession of an exclusive right or privilege granted by law is entitled to an injunction to restrain others from infringing its right, although the statute imposes various forfeitures on persons so offending.¹ A suit was brought by a railroad company against the defendant to obtain a perpetual injunction against the closing by him of a road through his land from the highway to a station-house of the plaintiff. It appearing in evidence that the company had substantially complied with the terms of an agreement, upon consideration of which the land used for the road was to be dedicated to the public, the injunction was granted.² Where an act of the legislature creating a corporation confers upon it a franchise of a public nature, of which it has been in the possession and enjoyment for a long time, all acts of a municipal corpora-

¹ Thompson v. N. Y. & Harlem R.R. Proprs. of Warren Bridge, 11 Pet. Co., 3 Sandf. Ch. 625; Mohawk Bridge 420.
Co. v. Utica, etc., R.R. Co., 6 Paige ² New York & N. H. R.R. Co. v. Ch. 554; Charles River Bridge Co. v. Pixley, 19 Barb. 428.

tion tending directly to the disturbance and destruction of the franchise are in legal contemplation a nuisance which can be remedied in a court of equity.¹ Commissioners who have been appointed by an act of the legislature to obtain subscriptions to the capital stock of a corporation, and then to proceed to the election of directors to manage the corporate affairs, will be restrained by injunction from proceeding further in the premises after they have once acted under the law and directors been elected. In such a case, where the prerequisites of the charter have been complied with, the corporation comes regularly into existence and the powers of the commissioners are at an end.² That the defendant obtained an office in a corporation by an election procured by him to be held by fraud, breach of trust, concealment, and treachery, confers on a court of equity jurisdiction to inquire into the validity of the election for the purpose of restraining the acts of the defendant and other persons claiming office by such election. This could be done even if the election held in such breach of trust had been conducted in the manner required by law.³ When the object of a bill filed by a corporation is to restrain acts of the defendants which they could only legally do as directors, they must show either a legal election that would put them in possession of the office or that they are *de facto* directors, and these facts must be determined by the court in order that it may decide whether or not the answer is sufficient.⁴ Although a corporation is not a trustee of its own stock, has no title in it, cannot restore it when it has been transferred fraudulently or by its own negligence, or render the equitable owner anything but damages, yet, in

¹ Central Bridge Co. v. Lowell, 4 Gray, 474. But the legislature has power to authorize a municipal corporation to convert a toll bridge into a free bridge as a part of the public highway, making the owners of the franchise compensation therefor, this being an exercise of the right of eminent domain. *Ibid.*

² Smith v. Bangs, 15 Ill. 399.

³ Johnston v. Jones, 8 C. E. Green N. J. 216.

⁴ *Ibid.*

the case of dividends, the corporation may maintain a bill of interpleader, and protect itself by paying the dividend as decreed by the court.¹ A corporation having vested rights may enjoin another corporation when the damage about to be done will be of a permanent and irreparable character, especially when the defendant seeks to commit the wrong under color of a charter.²

The name of a corporation is a trade-mark, and as such is entitled to the consideration and protection of a court of equity. Nor will the court refuse to enjoin its wrongful appropriation until the right to the name has been established by the verdict of a jury in an action at law. Such right does not vest in parol, but is shown by the record, if at all, and may be determined by the court in any form of proceeding. The jurisdiction to enjoin the use of the corporate name does not depend upon the insolvency of the corporation, which, as well as the validity of the corporate organization, may be investigated whenever and wherever such investigation becomes material to the determination of the rights of third persons who are parties to a judicial proceeding.³ The name of a corporation or partnership, adopted

¹ *Salisbury Mills v. Townsend*, 109 Mass. 115.

² *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Newburgh T. Co. v. Miller*, 5 Id. 101; *Florida, etc., R.R. Co. v. Pensacola, etc., R.R. Co.*, 10 Fla. 145. Mere ambiguity in the charter is sufficient to determine its meaning against the corporation and in favor of the public. Chief Justice BEST (4 *Bingham*, 452) gave as a reason for this, that if such a construction were not adopted, acts might be framed ambiguously in order to lull parties into security. Acts of incorporation passed at the same session of the legislature are to be taken *in pari materia* and receive a construction that will give effect to both if possible; but if each cannot

have the same effect when taken in connection, they must be so construed as to give effect to what appears to have been the main intention of the legislature. See *Florida, etc., R.R. Co. v. Pensacola, etc., R.R. Co.*, *supra*. The granting of a charter to a railroad company to construct a road between two points, does not give such company an exclusive privilege of constructing a road on that line. The only way that one corporation could secure a vested right of construction as against another, would be by occupying with an honest and faithful intention to construct, coupled with the ability to do so. *Ibid.*

³ *Newby v. Oregon, etc., R.R. Co.*, *Deady*, 609.

for the purposes of designating the origin and ownership of goods manufactured, will be protected upon the same principle and to the same extent that individuals are protected in similar cases. When persons allow their names to be embodied in the corporate name, the law will imply an agreement that the names shall continue to be used so long as the corporation exists, and, until its dissolution, such persons must use their own names subject to the rights of the corporation, unless relieved of the inconvenience by its consent.¹ Where a creditor of a corporation, as a bondholder, has a lien upon property owned or claimed by the corporation, and another corporate body is wrongfully using such corporation's name for the purpose of obtaining the property, the creditor may maintain a suit in equity to enjoin the wrongful use of the name. In such case the corporation whose name is alleged to be wrongfully used, must be a party plaintiff, or, if it refuses to bring a suit upon request, the bondholder may do so, making the corporation a party defendant.²

§ 319. Suit by stockholder for protection of corporate interests.—A stockholder may in some instances interfere for the protection of the corporation; but to warrant such interference something must have been done by its directors or managers which is not allowable by the terms of the charter. Fraudulent collusion between the corporation and any of its creditors by which its other creditors or stockholders may be wronged or defrauded, would justify a resort to equity.³ When a person embarks his means in the enterprises of a corporation, he thereby agrees that its affairs shall be man-

¹ Holmes v. Holmes, etc., Manf. Co.,
37 Conn. 278.

² Newby v. Oregon, etc., R.R. Co.,
supra.

³ Traventines' Appeal, 49 Pa. St. 310.
When, however, a corporation authorizes the creation of a debt, and it is done

with the assent of all of the stockholders as well as of the board of directors, and judgment has been confessed by the same authority, a consenting stockholder is not entitled to an injunction against an execution issued thereon.
Ibid.

aged by such directors or other controlling body as the stockholders may designate, and he has no ground to complain while the affairs of the corporation are carried forward in good faith within the authority conferred by the charter. But neither the directors nor the majority of the stockholders can do as they please with the property represented by the shares. They must not act fraudulently, nor exceed the powers conferred upon them by the law governing the corporation. A court of equity will enjoin on behalf of the stockholders any improper alienation or disposition of the property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises as well as the improper management of the business of the corporation, or a wrongful diversion of its funds. And in such cases equity may grant relief at the suit of a single stockholder.¹

A court of equity will, at the instance of a stockholder, control a corporation and restrain it from doing acts even within the scope of corporate authority, if such acts when done will amount to a breach of the trust upon which the authority has been conferred ; and the court will, after such acts have been done, relieve an injured stockholder from loss, if in the meantime no superior equity has intervened, nor the rights of innocent third parties attached. Where the property of a corporation has been sold under execution,

¹ Gifford v. N. J. R.R. Co., 2 Stockton, 171; Pond v. Vt. Valley R.R. Co., 12 Blatchf. 280; Grant v. Lewis R.R. Co., L. R. 8, Eq. 526. Courts of equity have jurisdiction over a corporation, at the instance of one or more of its members, to inquire into and enjoin any proceedings by individuals in whatever capacity or character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an ade-

quate remedy at law. Cunliff v. Manchester, etc., Co., 2 Russ. & Mylne Ch. 480, *n.*; Ware v. Grand Junc. Water Co., 2 Id. 470; Bagshaw v. Eastern Counties R.R. Co., 7 Hare, 114. If the stockholder be a resident of another State than that in which the corporation attempting to violate its charter or commit a breach of trust or duty has its domicile, he may file his bill in a United States court. Dodge v. Woolsey, 18 How. 331.

and no steps taken by the corporate authorities to redeem it within the period limited by law, a stockholder may interpose and redeem it for the benefit of the corporation, and hold it liable for the money advanced for that purpose; and by so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all of the rights of the original purchaser at the sheriff's sale.¹ The charter of a bank provided that the rate of discount at which loans might be made should not exceed one-half of one per cent. for thirty days. Upon the complaint of a stockholder that the president and cashier were in the habit of purchasing, from note brokers and others, large quantities of promissory notes at rates of discount greatly exceeding the legal rate, an injunction was granted restraining the bank from discounting or purchasing notes except at regular meetings of the board of directors, and at the rate provided in the statute, the court holding that any other manner of discounting paper, or any violation of the rules in relation to the rate of discount, was a violation of the fundamental articles on the faith of which stockholders had invested their money in the institution.² It was held in Connecticut that the inhabitants of a school district had no right to use the school-house for religious meetings and Sunday-schools against the objection of a single tax-payer of the district, notwithstanding all of the other tax-payers of the district might have voted to allow such use, and that an injunction would be granted restraining such use on the application of a tax-payer although the injury to the school-house would be trifling.³

An injunction will not lie to prevent the directors from merely allowing as correct a fraudulent account against the corporation unless it appears that irreparable injury will thereby result to the plaintiff.⁴ As a rule, a stockholder

¹ Wright v. Oroville, etc., Mining Co.,
40 Cal. 20.

² Manderson v. Commercial Bank,
28 Pa. St. 379.

³ Scofield v. Eighth School District,
27 Conn. 499.

⁴ Rogers v. Lafayette Agrl. Works,
52 Ind. 296; Samuel v. Holladay, 1

cannot bring a suit for the protection of the corporate property, unless there is an allegation in the bill that the corporation was requested to act in the matter and refused to do so.¹ But when it is alleged that the directors are under the influence of the defendant, and that they have abdicated their proper functions and surrendered the control of the affairs of the corporation to him, it is unnecessary for the plaintiff to show that he demanded of the directors the commencement of an action against him.² In such case an excuse is given for the bringing of the suit by the stockholder which is equivalent to a refusal of the directors on request to bring it.³ A stockholder may bring a suit against a wrong-doer whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their shares, when an application has been made to the directors to bring the

Woolw. 400. A stockholder may file a bill in equity to restrain the officers of the corporation from the commission of an unauthorized act which will not only constitute a forfeiture of its charter, but also subject the corporation to heavy fines and penalties. Bliss v. Anderson, 31 Ala. 612.

¹ Ware v. Bazemore, 58 Ga. 316; Wilkie v. Rochester, etc., R.R. Co., 12 Hun, 242; Doud v. Wisconsin, etc., R.R. Co., 65 Wis. 108.

² Rogers v. Lafayette Agrl. Works, *supra*; Osborn v. Bank of U. S., 9 Wheat. 738. The principle that a stockholder cannot maintain a bill in equity against a wrong-doer to prevent an injury to the corporation unless it be made affirmatively to appear that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor of the corporation. Lothrop v. Stedman, 42 Conn. 583.

³ Robinson v. Smith, 3 Paige Ch.

222; Cunningham v. Pell, 5 Id. 607; Hodges v. New England Screw Co., 1 R. I. 312; March v. Eastern R.R. Co., 40 N. H. 548; Dodge v. Woolsey, 18 How. 341; Peabody v. Flint, 6 Allen, 52; Gray v. Lewis, L. R. 8, Eq. 526. In a suit in equity brought by a stockholder against the directors or officers of a corporation, so far as the bill sets out acts *ultra vires* in issuing stock and breeches of trust which are frauds on the stockholders and beyond the power of the corporation or its directors to affirm, sanction, or make good, the reason of the rule for an application to the corporation or its board of directors to bring a suit, does not exist. Heath v. Erie R.R. Co., 8 Blatchf. 347. When a corporation has been injured by a tort or a breach of contract, or has any right of action, legal or equitable, against a third person, an individual stockholder cannot prosecute because the corporation fails or refuses to do so. Samuel v. Holladay, *supra*.

suit and they have refused.¹ But an individual stockholder cannot maintain an action at law against the directors for damages sustained by reason of their negligence. His remedy must be in a form to protect the interests of the corporation as trustee for all of its stockholders and creditors.²

§ 320. Suit by and against a stockholder individually.—The legal entity of a corporation is not affected by the fact that one of its debtors is also a stockholder, director, or corporate officer, and it may, in its corporate capacity, sue him as an individual or natural person.³ So the case of an incorporated company is wholly dissimilar from that of an ordinary copartnership or joint stock association as to the right of individual members to institute suits against the company. An individual member of a corporation is distinct from the artificial body endowed with corporate powers. If he is a creditor of the corporation, he may maintain a suit against it, and, if the suit is carried to judgment in his favor, his lien will not be postponed for the benefit of a subsequent attaching creditor.⁴ When the directors have misapplied a portion of the corporate funds to which a stockholder has a distinct right, as, for instance, a dividend, he may in an action recover the amount misapplied; and if such misapplication has not been effected, but is threatened, he may file a bill in equity for an injunction.⁵ Where the board of directors, in issuing new stock to the shareholders generally,

¹ *Memphis v. Dean*, 8 Wall. 64.

² *Craig v. Gregg*, 83 Pa. St. 19. See *McAleer v. McMurray*, 58 Pa. St. 126.

³ *Wausau Boom Co. v. Plummer*, 35 Wis. 274.

⁴ *Waring v. Catawba Co.*, 2 Bay S.C. 109; *Brinham v. Wellsburg Coal Co.*, 47 Pa. St. 43; *Peirce v. Partridge*, 3 Metc. 44; *Westcott v. Fargo*, 6 Lansing, 319. A building committee may contract with one of its own members

for labor and materials the same as with a stranger, in which case the member of the committee so contracted with should bring an action against the society, and not in the joint names of himself and the other committeemen. *Rogers v. Danby Universalist Soc.*, 19 Vt. 187; *Geer v. School Dist. of Richmond*, 6 Id. 76; *Sawyer v. Meth. Ep. Soc. in Royalton*, 18 Id. 405.

⁵ *Samuel v. Holladay, Woolw.* 400.

refuse to issue to a particular shareholder his due proportion, the injury is peculiar and personal to him, and he may compel by a suit in equity against the corporation the issue of his share of stock to him, at least as long as there is sufficient stock remaining undisposed of, though he might probably have maintained an action at law against the corporation for damages. Notwithstanding there may be other shareholders in a like situation with him, their right and his is several, and he cannot represent them.¹ A stockholder will not be entitled to an injunction merely because the act of the corporation will be injurious to him in another character, when such act will be in furtherance of the objects of the incorporation, and for the benefit of all of the stockholders as such.² If a stockholder intends to treat an act of the corporation, or of its officers or agents, as illegal, he must insist upon his objections before the act is committed. He cannot stand by and see it done, and then hold the corporation responsible. Where at a meeting of the board of directors of a corporation for the purposes of pecuniary profit an act is ordered to be done without objection being made, either then or subsequently, by any director or stockholder, and the act is afterward performed, its legality cannot be questioned in a suit in equity, on the ground of irregularity.³ Although it is not competent for a legislature to authorize a corporation to embark in new enterprises beyond the scope and outside of the objects contemplated by its charter at the time complainants became members by subscribing to the stock, and thus to change the charter and the risks and prospects of the stock-

¹ *Dousman v. Wisconsin, etc., Co.*, 40 Wis. 418. When a person deliberately subscribes for a certain number of shares in a corporation, and alleges that he intended to subscribe for a less number, a court of equity will not relieve him on the ground of mistake, especially if he neglects to notify the

corporation of his mistake until after it has organized and contracted for work to be done on the faith that the subscription was correct. *Diman v. Providence, etc., R.R. Co.*, 5 R. I. 130.

² *Baltimore, etc., R.R. Co. v. Wheeling*, 13 Gratt. 40.

³ *Samuel v. Holladay, supra.*

holders without the consent of all of them, yet before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights.¹ When a person is damaged by the enforcement of an unlawful ordinance, his remedy is an action for damages on each repetition of the enforcement, not by the interposition of a court of equity by injunction.² A bill in equity to enforce the performance of public duties by a corporation cannot be maintained by a private party in the absence of authority and of special injury to him or to his property, that is, an injury to him individually as contradistinguished from injury to him in common with the whole public.³

The filing of a bill in equity after the institution of an action by another creditor of the corporation against the directors and stockholders who are personally liable, although it purports to be for the benefit of all creditors who may elect to become parties, will not defeat a recovery against the corporation, or affect the right to levy on the stockholders who are by statute made chargeable in an action at law.⁴ An adjudication in bankruptcy against a corporation will excuse a compliance with a condition which requires suit to be brought against the corporation within a year after the maturity of the debt, judgment to be recovered, and an execution to be issued thereon and returned unsatisfied before bringing an action to charge an individual stockholder. The object of the condition is to compel the creditor to exhaust the assets of the corporation before

¹ Chapman v. Mad River, etc., R.R. Co., 6 Ohio St. 119. See Sparhawk v. Union, etc., R.R. Co., 54 Pa. St. 401. erred in its action either on the merits, or by acting without having jurisdiction. Fisher v. Board of Trade of Chicago, 80 Ill. 85.

² Cohen v. Commissioners, 77 N.C. 2. If an association expel a member, a court of equity cannot restore him to his position even if the association has

³ Buck Mt. Coal Co. v. Lehigh, etc., Co., 50 Pa. St. 91.

⁴ Johnson v. Sommerville D. & B. Co., 15 Gray, 216.

seeking to enforce the liability of the stockholder. When the declaration shows that this has been done, and that a literal performance of the condition would be vain and fruitless, such performance is excused.¹

§ 321. Suit by minority of shareholders.—When the majority attempt to benefit themselves at the expense of the minority by dealing with something which is the property of the whole corporation, the court may interfere to protect the minority. In such a case the bill is rightly filed by one shareholder on behalf of the others against the corporation.² If a corporation is about to exceed its powers by applying its property to objects beyond the authority of its charter, a court of equity will grant relief to a minority of its stockholders who dissent from such use of its funds.³ Nothing, however, connected with internal disputes between the shareholders can be made the subject of a bill by some one shareholder in behalf of himself and others unless there be something illegal, oppressive, or fraudulent,—something *ultra vires* on the part of the corporation *qua* corporation, or on the part of the majority of the members, so that they are not fit persons to determine it.⁴

A court of law will interpose to control the proceedings of ecclesiastical bodies when a right of property is involved, but in no other instances. It will inquire into the regularity of the election of the trustees of a religious corporation to

¹ *Flash v. Conn.*, 109 U. S. 371.

² *Menir v. Hooper's Telegraph Works*, L. R. 9, Ch. 350. A shareholder may file a bill in behalf of himself and all other shareholders to annul the forfeiture of his shares. *Sweeny v. Smith*, L. R. 7, Eq. 324.

³ *Hartford, etc., R.R. Co. v. Crosswell*, 5 Hill, 383; *Scofield v. Eighth School District*, 27 Conn. 499; *Pratt v. Pratt, Reed & Co.*, 33 Id. 446.

⁴ *Macdougall v. Gardiner*, L. R. 1,

Ch. D. 13. Where an individual stockholder has money of the corporation in his hands accruing from a sale of corporate property, another shareholder cannot recover his proportion of it in an action for money had and received, unless the corporation as such has assented to the sale of its property and to a distribution of the proceeds of such sale among the holders of the shares. *Hodson v. Copeland*, 16 Me. 314.

whom the corporate property is committed, and will determine the qualifications of those who are allowed to vote at such an election. It will also, when the right to property is in issue, institute an inquiry into the doctrines and opinions of a religious society as facts upon which the ownership of property may depend. But with respect to spiritual matters, and the administration of the spiritual and temporal affairs of the church, ecclesiastical courts and governing bodies of the religious society have exclusive jurisdiction, and their decisions are final.¹

§ 322. Suit by stockholders against directors and officers.

—It is not the province of a court to superintend the current business of corporations with a view to measure the degree of industry or skill exercised by the directors, officers, and agents, and the court will not interfere to review or correct their proceedings, although under their management the business has been unprofitable. But their decisions and proceedings when interested are always open to examination, and it is incumbent on them to show that the utmost good faith has characterized their conduct. Such acts, however, even if voidable, are not absolutely void, and whoever seeks to avoid them by suit must show that he has been thereby injured.² It is error to decree the repayment

¹ Livingston v. Rector, etc., of Trinity Church, 45 N. J. (16 Vroom) 230. The trustees of a Methodist Episcopal church cannot lawfully close the church edifice against the duly appointed preacher, because their action is in accordance with the expressed wishes and determination of a majority of the members, and in their opinion the welfare of the church demands that he should not be its pastor. Whitecar v. Michenor, 37 N. J. Eq. 6; People v. Steele, 2 Barb. 397, 413. See Brunenmeyer v. Burke, 32 Ill. 183; Com. v. Cornish, 13 Pa. St. 288, 290.

* Hedges v. Parquett, 3 Oregon, 77.

See Robinson v. Smith, 3 Paige Ch. 222; Scott v. Eagle Ins. Co., 7 Id. 198. Pratt v. Pratt, Reed & Co., 33 Conn. 446. While directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, wilful misconduct, or breach of trust committed in their own behalf, and for gross inattention and negligence, by which fraud or misconduct has been perpetrated by agents, officers, or co-directors, yet they are not liable for mistakes of judgment, though so gross as to appear absurd and ridiculous, provided such exercise of judgment is honest and fairly within the

of his salary by a corporate officer duly appointed. If in the management of the business of the office the by-laws and regulations of the corporation are disregarded and loss sustained on this account, the loss should constitute the measure of relief.¹ If the managers of a corporation are about to engage in an enterprise not contemplated by the charter, or to apply the corporate funds or credit to any other than the purposes therein specified, a court of equity will interfere by injunction at the instance of the stock-holders. So equity has jurisdiction to interpose by injunction when public officers are proceeding illegally to impair the rights or injure the property of individuals or corporations, or when it is necessary in order to prevent a multiplicity of suits.² An improper investment of the funds of a savings bank by its trustees would not justify a court in continuing an injunction restraining its president from discharging the duties of his office, unless some further misuse of the corporate funds or some other act were threatened in violation of the plaintiffs' rights. But if the continued exercise of authority by an officer appeared to endanger the corporate interests, and a proper suit to prevent it was not brought by the corporation, it would have to be done by those whose interests were endangered.³

The cases in which the jurisdiction of the court is recognized are those in which proceedings are instituted in be-

scope of the powers and discretion confided to the managing body. Spering's Appeal, 71 Pa. St. 1.

¹ Neall v. Hill, 16 Cal. 145. Where a bank charter provided that in case the total amount of debts which the bank at any time owed exceeded three times the amount of stock paid in, the directors under whose administration it happened, should be liable for the same in their individual and private capacities, and that an action of debt might in such case be brought against

them or any of them, or any of their heirs, executors, or administrators, any covenant, condition, or agreement to the contrary notwithstanding, it was held that an action against one of the directors on a debt of the bank under the provision did not abate by reason of the expiration of the charter of the bank *pendente lite*. Moultrie v. Smiley, 16 Ga. 289, BENNING, J., dissenting.

² Smith v. Bangs, 15 Ill. 399; Sears v. Hotchkiss, 25 Conn. 171.

³ People v. Conklin, 5 Hun, 452.

half of stockholders against the officers of the corporation for fraudulent misapplication of funds or breach of trust in the discharge of official duties; the doctrine seeming to be that courts of equity, aside from statutory proceedings, do not exercise jurisdiction over a corporation as over a partnership to dissolve it and distribute its assets, but that they will afford stockholders relief from the malfeasance of those intrusted with the management of the corporate business.¹ Stockholders are entitled to an injunction to restrain the officers of the corporation from the continued commission of acts alleged to be contrary to law and endangering the existence of the charter, notwithstanding upon the affidavits exhibited on both sides the truth of the charges is left in doubt. While the awarding of an injunction under such circumstances can do no harm, it affords the stockholders a proper measure of protection.² A bill cannot be maintained by the stockholders of a corporation against its officers for conduct prejudicial to it, to which the corporation is not made a party, if no reason is given why the relief sought cannot be had through the corporation or in its name.³

¹ Cunningham v. Pell, 5 Paige Ch. 607; French v. Gifford, 30 Iowa, 148. Directors are liable in equity for any wilful breach of their trust, or misapplication of the funds, or inattention to their official duties, whereby the corporate property is wasted. Citizens' Loan Assoc. v. Lyon, 29 N. J. Eq. 110; Citizens' Building Assoc. v. Coriell, 34 Id. 383; Ackerman v. Halsey, 37 Id. 356; Robinson v. Smith, 3 Paige Ch. 222; Brinkerhoff v. Bostwick, 88 N. Y. 52; Trustees v. Bosseieux, 3 Fed. 817. The liability is to the corporation in the first instance; but if it refuses to act, a person aggrieved may bring the suit. If the corporation be insolvent, and its affairs are in the hands of a receiver, he may maintain the litigation. If he refuses, or is himself involved, a person aggrieved may sue. Chester v. Hal-

liard, 34 N. J. Eq. 341; Brinkerhoff v. Bostwick, *supra*. The officers of a corporation appointed an agent to purchase for the benefit of all of the shareholders certain stock in the corporation which was about to be sold; but after the purchase of the stock, they had a portion of it transferred to themselves. It was held that the ownership of the stock became vested in the officers by their purchase, but that a shareholder was entitled to recover damages from them for the injury sustained by him, the amount of which was to be estimated according to the number of shares owned by him in the corporation. Kimmel v. Stoner, 18 Pa. St. 155.

² Manderson v. Commercial Bank, 28 Pa. St. 379.

³ Black v. Huggins, 2 Tenn. Ch. 780. There is no legal privity between the

"The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted, the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were successful, to allow the corporation to renew the litigation in another suit involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."¹ If a corporation refuses to call its officers to account for wilfully abusing their trust, the stockholders may file a bill making the corporation a party defendant. But equity regards diligence as one of its important elements, and, therefore, unreasonable delay to prosecute an existing claim, is a bar to relief, especially when the parties cannot be restored to their original position, and injustice might be done.²

A person who is not a stockholder cannot be joined as a plaintiff in a bill in equity against the directors or officers of a corporation with stockholders, and his want of interest will be a good ground of demurrer to the whole bill. One who has no shares standing in his name on the books of

holders of shares in their individual capacity on the one hand and the directors of the corporation on the other. The corporation has a separate existence as a distinct person in whom the whole stock and property are vested, and to whom agents are responsible for contracts made in reference to the capital, and for torts and injuries diminishing or impairing it. An individual holder of shares cannot maintain an action against the directors for negligence and malfeasance in office, even though in consequence the whole capital of the corporation has been wasted and the shares rendered valueless. The remedy of the stockholders is in the

power of the corporation in its corporate capacity to obtain redress for injuries done to the common property by the recovery of damages. *Smith v. Hurd*, 12 Metc. 371.

¹ *Davenport v. Dows*, 18 Wall. 626, per *DAVIS*, J. See *Atwool v. Merryweather*, L. R. 5, Eq. 464, n.

² *Peabody v. Flint*, 6 Allen, 52. Where the place of a trustee was declared vacant by the board, and more than ten years thereafter he sought to restrain such action by injunction, his prayer was denied because of laches. *Van Ranst v. N. Y. College of V. Surgeons*, 4 Hun, 620.

the corporation is not a stockholder, notwithstanding he holds certificates of stock issued to other persons by the corporation with powers of attorney authorizing the transfer of such shares to him executed by those in whose name the shares are registered, and the corporation has wrongfully refused on demand to allow such transfer to be made to him.¹ Where the statute provided that no company formed to navigate the lakes and rivers of the State should combine with any other company formed under the act, for any purpose, it was held that the object of the legislature in using the word "combine" was to prevent coalitions, unions, mutual agreements, or blendings of the companies organized and incorporated under the act; and two or more rival steamboat companies having mutually agreed to operate their respective lines for their joint benefit, the landings to be jointly used, and the expenses attending them to be equally borne, with an equal division of the receipts, an injunction was granted restraining them from doing anything in relation to or under the agreement. Such suit may be brought by a stockholder of one of the companies who sues on behalf of himself and such other stockholders as shall elect to join in the action, the corporations who are parties to the agreement being before the court.²

If the governing body of a corporation is so divided that it cannot act in harmony, it is in the power of the court to interfere by injunction, and to select a receiver until a meeting of the stockholders can be held and a new governing body be appointed.³

§ 323. Bill in equity against corporation by third persons.— Although an injunction will not issue to prevent a trespass simply as such, yet equity will restrain corporations from a gross abuse of their powers to the injury of individuals.⁴ It

¹ Heath v. Erie R.R. Co., 8 Blatchf. 347.

² Featherstone v. Cooke, L. R. 16, Eq. 298.

³ Watson v. Harlem, etc., Nav. Co., 52 How. Pr. 348.

⁴ Frederick v. Groshon, 30 Md. 436. A stockholder has such an interest in a

was charged in a suit against a corporation and admitted by the answer that the defendant applied to the legislature for an act of incorporation, and that while the matter was pending the complainants opposed its passage on the ground that the business contemplated by the proposed corporation would injure the complainants ; that in order to satisfy them the defendant agreed to and did insert in the charter a proviso that the company about to be incorporated should not injure the complainants in the manner specified ; whereupon the latter withdrew their opposition to the act. An injunction was granted restraining the defendant from inflicting upon the complainants the apprehended injury.¹ The plaintiff entered into a contract with a railroad company to build its road, and to receive as compensation therefor United States government bonds and stock and bonds of the company. After the plaintiff had made arrangements in good faith to carry out his contract, and had spent a large sum of money on the road, the company gave notice that it would ignore the contract, and other parties were employed to do the work. To secure its bonds, which were to be delivered to the new contractors for their services, the company executed two mortgages on the road, its appurtenances and lands. In a suit for an injunction restraining the company from issuing bonds under the mortgages, and praying that the defendant might be decreed to perform specifically its covenants in the contract, it was held that if on the case made by the bill the court ought to entertain it, it should grant the injunction, otherwise, before the hearing on the merits, the defendant would render itself incapable of executing the contract specifically.² The defendant, a corpora-

suit by or against the corporation as to bring him within a statute which provides that "no judge of any court shall sit as such in any cause to which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of consanguin-

ity or affinity to either of the parties." Place v. Butternuts Manf. Co., 28 Barb. 503, BALCOM, J., dissenting.

¹ Holsman v. Boiling Spring, etc., Co., 14 N. J. Eq. 335.

² Ross v. Union Pacific R.R. Co., Woolw. 26. A contract for the mak-

tion owning certain patents for a button-hole machine, contracted with the complainant corporation to give it the exclusive sale of the machines in certain specified territory, and to furnish the complainant with machines as called for to the full capacity of the defendant's factory. The agreement provided that if the complainant should fail to carry out the contract on its part, the forfeiture of the agency should be considered the only penalty for such failure. It was alleged that after the complainant had bought and paid for a large number of the machines, and had made a market for them, the defendant refused to deliver any more machines, and was taking measures to dissolve for the purpose of avoiding the contract, and to that intent had assigned the patents to a trustee for another association. Although the court could not decree a specific performance, an injunction was granted restraining the trustee from transferring the patents, and forbidding the dissolution of the defendant, or the manufacture and sale of machines excepting in conformity with the contract.¹ A railroad company served a landowner

ing of a railroad will not be specifically enforced. Nor one for the construction of a building unless : 1st, the building was to be erected upon the land of the person who agreed to do it ; 2d, where the consideration for the agreement was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already executed the contract on his part by a conveyance ; or 3d, where the building was in some way essential to the use or contributory to the value of adjoining land belonging to the plaintiff. In any case, specific performance will be decreed only when the court can dispose of the matter by an order capable of being enforced at once. The court will not decree a party to perform a continuous duty extending over a number of years, but will leave the opposite party to his

remedy at law. *Ibid.* Equity will never undertake to enforce specific performance of a contract by a corporation when the incapacity of the defendant to fulfil the contract would render the decree a vain or imperfect act. There would be such incapacity, if there were good reason to apprehend that the company had lost its corporate existence. Nor will specific performance be enforced if the directors and officers of the corporation, who should act in the matter, would be liable to severe and ignominious punishment under the statute for so doing. *Danforth v. Phila., etc., R.R. Co.*, 30 N. J. Eq. 12.

¹ *Singer Co. v. Union Co.*, 1 Holmes 253. A corporation may be enjoined from removing the corporate property beyond the jurisdiction of the court. *Mathews v. Trustees*, 7 Phila. 270.

with a notice to treat for the purchase of a portion of his land. In his reply he stated the title under which he held and the prices of the land. To this the company answered through its solicitor: "The company will pay the amount claimed." It was held that the company would be compelled to specifically perform the agreement.¹ As a railroad company has wide powers in derogation of individual rights, it is bound to exercise them with moderation and discretion, and with a reasonable regard to the rights of other persons. A company which was excavating on its own land in such a careless way as to threaten serious injury to other property, was restrained by injunction until a surveyor appointed by the court reported the injury done, and also what measures ought to be adopted to secure the adjoining premises.²

¹ *Inge v. Birmingham, etc., R.R. Co.*, 23 Eng. L. & Eq. 601.

² *Biscoe v. Gt. Eastern R.R. Co.*, L. R. 16, Eq. 636. See *Big Mt. Improvement Co.'s Appeal*, 54 Pa. St. 361. The remedy by injunction extends to all acts contrary to law and prejudicial to the interests of the community for which there is no adequate redress at law. When two bodies claim to be regularly organized, as the common council of a city, and each is proceeding to act as such to the detriment of the public interests, either of them has the right to demand that it and the interests of the public committed to it shall be protected against the usurpation of the other. On the division of a body that ought to be a unit, the test as to which one represents the legitimate succession is, which has maintained the regular forms of organization according to the laws and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases. In *Kerr v. Trego*, 47 Pa. St. 292, there were twenty-three members of a common

council, including the president, whose terms had yet a year to run. The clerk and assistant clerk were still in office, having been elected under an ordinance which provided that they should continue therein until the organization of a new common council, and until their successors were duly elected. On the day and at the hour appointed by law for the organization of the new council, the former president and clerks being in their usual places, the roll of the members whose terms of office had not yet expired was called, and then the new members were requested to present their certificates of election in order that their names might be registered. It was held that this was the mode of proceeding which had the sanction of the common usage of every public body into which only a portion of new members is annually infused, and though the result might be that the successful faction would make an unfair use of power in the reception of the other members, the court could not interfere.

§ 324. Liability of corporations to actions on contract.—In general, a corporation can, by its authorized agent, make a promissory note or other contract not under seal on which a special action of assumpsit will lie.¹ As a rule, however, when a corporation can only contract under its corporate seal, an action against it cannot be maintained on an agreement not under seal. The excepted cases are: 1st. Where the acts done are such as are called for by the very constitution of the corporation; 2d. When the acts are required for convenience, management and comfort, and are trivial in their nature and of frequent occurrence, or such that an overruling necessity requires them to be done at once.² When the law imposes an obligation on a corporation which it refuses to discharge, it may be held liable civilly at the suit of a party who sustains damage in consequence of its refusal. In legal contemplation a corporation undertakes to perform what its charter enjoins upon it, and an action of assumpsit may be maintained against it upon an implied contract.³ Where the committee of a corporation enters into a contract which is ratified by the corporate body, an action of assumpsit may be maintained against the corporation on the agreement, notwithstanding it is signed by the members of the committee under their indi-

¹ Rex v. Bigg, 3 P. Wms. 419; Same v. Bank of England, Douglass, 524; Gray v. Portland Bank, 3 Mass. 364; Mann v. Chandler, 9 Id. 335; Hayden v. Middlesex Turnpike Co., 10 Id. 307; Danforth v. Schoharie, etc., Co., 12 Johns. 227; Dunn v. St. Andrew's Church, 14 Id. 118; Randall v. Van Vechten, 19 Id. 60; Mott v. Hicks, 1 Cowen, 513; Proctor v. Webber, D. Chipman, 371; Butts v. Cuthbertson, 6 Ga. 166; Bank of Columbia v. Patterson, 7 Cranch, 299; *In re Gt. Western Tel. Co.*, 5 Biss. 363; Lawrence v. Gebhard, 41 Barb. 575; Monument

Nat. Bank v. Globe Works, 101 Mass. 57; Brand v. Donaldsonville, 28 La. Ann. 558. *Contra*, Buckbill v. Turnpike Co., 3 Dallas, 496.

² Diggle v. London, etc., R.R. Co., 5 Exch. 442.

³ Seagraves v. City of Alton, 13 Ill. 366; Bulkley v. Derby Fishing Co., 2 Conn. 256; Waring v. Catawba Co., 2 Bay. 109; Antipoeda Baptist Church v. Mulford, 3 Halst. 182; Fleckner v. Bank of U. S., 8 Wheat. 338; Bank of Metropolis v. Guttschlick, 14 Pet. 19. See Burdick v. Champlain Glass Co., 11 Vt. 19.

vidual seals.¹ If the construction of a railroad within a specified time was the essential inducement to the making of a contract to donate land to the corporation, or to subscribe for its stock, an extension by the legislature of the time for the construction of the road will not discharge the corporation from its obligation to fulfil the contract on its part.²

When a government becomes a member of a corporation, it divests itself, so far as concerns the corporate transactions, of its sovereign character, and takes that of a private citizen. Thus, if a State which is not suable in its own courts has an interest in a corporation to which it has given the capacity to sue and be sued, it voluntarily strips itself of its sovereign character so far as respects the transactions of the corporation, and waives all the privileges of that character.³ A railroad company is, therefore, liable to be sued, notwithstanding a State is its sole corporator and proprietor.⁴ *Quasi* corporations, such as towns and parishes, which hold meetings and regulate their proceedings under statutes, are liable to actions of assumpsit which may be maintained by evidence of parol promises whether express or implied.⁵ A municipality has but a delegated authority,

¹ Haight v. Sahler, 30 Barb. 218; Randall v. Van Vechten, 19 Johns. 60.

² Henderson v. Railroad Co., 17 Texas, 560. The charter of an incorporated beneficial society provided that its sick members should be paid a certain amount weekly during their illness while so much remained in the funds. It was held that neither an action nor a mandamus would lie in behalf of a member to recover the allowance, as it must be presumed that the corporation was not in funds, and the member was concluded by the decision of the forum of his own selection. Toram v. Howard Beneficial Assoc., 4 Barr. Pa. 519. A new tribunal may be created by the charter

with exclusive power to decide whether the corporation has failed to perform its duties; and if a party thinking himself aggrieved fails to apply to such tribunal for redress, he cannot recover damages which are the result wholly or in part of his own neglect. Bassett v. Carleton, 32 Me. 553.

³ Bank of U. S. v. Planters' Bank, 9 Wheat. 904; Bank of Ky. v. Wister, 2 Pet. 318.

⁴ Western, etc., R.R. Co. v. Taylor, 6 Heisk. 408.

⁵ Hayden v. Middlesex T. Co., 10 Mass. 397. Town commissioners are not liable to a private action for a mere neglect or omission to keep the highways of their towns in repair. A dis-

and all its acts are void except within its appropriate sphere. Hence, if land be taken for a public improvement, the submission of the question of damages to a reference is *ultra vires* and void if the charter gives no authority to enter into such a contract, and an action will not lie as upon an assumpsit for such damages.¹

§ 325. Liability of corporations to actions for torts.—We have seen² that a corporation is liable, the same as a natural person, for the tortious acts of its duly constituted agents committed by its authority, express or implied, while engaged in the discharge of their duties, and that actions may be maintained against the corporation therefor, even though the wrongs arose from mistake, or were done contrary to instructions. The cases in which corporations have been sued for trespass, both to the person and property, are numerous.³ An action on the case for a vexatious suit

tinction is to be made that a public officer is not liable to a private action when the duty of such officer is exercised in behalf of the public at large, but that he will be so liable if the duty is in respect to an individual. Garlinghouse v. Jacobs, 29 N. Y. 297. See Riddle v. Proptrs. of Locks, etc., 7 Mass. 169.

¹ Paret v. Bayonne, 39 N. J. 559; S. C. 40 Id. 333.

² *Ante*, Ch. 16.

³ In Dater v. Troy Turnpike & R.R. Co., 2 Hill, 629, COWEN, J., said: "The old doctrine, always admitted to be questionable, that trespass or ejectment will not lie against a corporation aggregate, is exploded by the modern authorities." See Chicago, etc., R.R. Co. v. Fell, 22 Ill. 333; Same v. Williams, 55 Id. 185; Crawfordsville, etc., R.R. Co. v. Wright, 5 Ind. 252; Evansville, etc., R.R. Co. v. Baum, 26 Id. 70; Jeffersonville R.R. Co. v. Rogers, 38 Id. 116; Edwards v. Union Bank, 1

Branch Fla. 136; Eastern Counties R.R. Co. v. Broom, 6 Exch. 314; 2 Eng. L. & Eq. 406; Phila. R.R. Co. v. Derby, 14 How. 468; Crocker v. New London, etc., R.R. Co., 24 Conn. 249; Hay v. Cohoes Co., 3 Barb. 42; First Baptist Church v. Schenectady, etc., R.R. Co., 5 Id. 80; Lee v. Sandy Hill, 40 N. Y. 442; Jackson v. Second Avenue R.R. Co., 47 Id. 274; Pa. R.R. Co. v. Vandiver, 42 Pa. St. 365; Brokaw v. N. J. R.R. Co., 32 N. J. 328; Kline v. Cent. Pacific R.R. Co., 39 Cal. 587; Moore v. Fitchburg R.R. Co., 4 Gray, 465; Coleman v. N. Y. & N. H. R.R. Co., 106 Mass. 160; Carman v. Steubenville, etc., R.R. Co., 4 Ohio St. 399; Louisville, etc., R.R. Co. v. Faulkner, 2 Head. Tenn. 65. *Contra*, Foote v. Cincinnati, 9 Ohio, 31; Orr v. Bank of U. S., 1 Ohio St. 36. In Massachusetts, where the statute required a railroad company to file a location of its road, it was held that the company would be liable in trespass for con-

may be sustained against a corporation aggregate. The immunities of corporations for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection for all of their rights and privileges, and no more. They are civilly liable in their corporate capacity for all torts which work injury to others, whether acts of omission or commission ; for negligence merely, or for direct violence.¹ Although *quasi* corporations are liable to information or indictment for the neglect of a public duty imposed on them by law, yet no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute.²

§ 326. Suits against foreign corporations.— Unless a corporation appears voluntarily, it can only be sued *in personam*

structing its road on private land other than that described in the location filed. Hazen v. Boston, etc., R.R. Co., 2 Gray, 574. If a servant of the corporation did a lawful act in an unlawful way, case would be the proper remedy ; but where the act was unlawful of itself, and not merely from the mode of doing it, trespass would lie. St. Louis, etc., R.R. Co. v. Dalby, 19 Ill. 353. See Chilton v. London, etc., R.R. Co., 16 Mees. & Welsb. 212.

¹ Goodspeed v. East Haddam Bank, 22 Conn. 530; Vance v. Erie R.R. Co., 32 N. J. 334. See Owsley v. Montgomery, etc., R.R. Co., 37 Ala. 560; McLellan v. Cumberland Bank, 24 Me. 566; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Williams v. Ins. Co., 57 Miss. 759; 34 Am. R. 494; Copley v. Grover, etc., Machine Co., 2 Woods, 494; Wheless v. Nat. Bank, 1 Baxter Tenn. 469; Carter v. Howe Machine Co., 51 Md. 290; 34 Am. R. 311. A corporation may be guilty of a conversion of property, and trover lie against it. Beach v. Fulton Bank, 7 Cowen, 484. A city council in cancel-

ling and destroying city bonds belonging to a ward, commits a tortious conversion of the ward's property, which renders the corporation liable to an action of trover, and dispenses with the necessity of a demand and refusal before suit. Baltimore v. Norman, 4 Md. 352.

² Riddle v. Proprietors of Locks, etc., 7 Mass. 169; Bray v. Wallingford, 20 Conn. 416; Symonds v. Supervisors, etc., 71 Ill. 355. A municipal corporation is not liable in trespass where one of its officers seizes property on a false claim that the owner has violated an ordinance, unless the corporation previously authorized or subsequently ratified the seizure. Fox v. Northern Liberties, 3 Watts & Serg. 103. A municipal corporation passed an ordinance for licensing auctioneers in which it was provided that a suitable bond should be furnished by a person applying for such a license. It was held that the corporation was not liable for losses sustained by individuals from the fraudulent conduct of an auctioneer who had given no bond. Fowle v. Alexandria, 3 Pet. 398.

in a different State from that in which it was created, in virtue of a provision of law authorizing suits against foreign corporations having agents in the State. There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of the court; but in either case, when the service can be made, or when the person of the corporation appears and submits to the jurisdiction, the court has authority to proceed.¹

In England, since the judicature acts, foreign corporations, though not incorporated according to English law, may be sued in English courts, whether resident in England or not.² At common law there is no process which can be

¹ Lathrop v. Union Pacific R.R. Co., 1 McArthur, 234. See Libby v. Hodgson, 9 N. H. 396; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. 15; Nat. Condensed Milk Co. v. Brandenburgh, 40 Id. 111; Newell v. Gt. Western R.R. Co., 19 Mich. 336; Latimer v. Union Pacific R.R. Co., 43 Mo. 105; Balt. & Ohio R.R. Co. v. Weightman, 29 Gratt. 431; Weight v. Liverpool Ins. Co., 30 La. Ann. 1186; Barnett v. Chicago, etc., R.R. Co., 4 Hun, 114; Bawknigh v. Liverpool, etc., Ins. Co., 55 Ga. 194; Peckham v. North Parish, 16 Pick. 274. See Post, sec. 329.

² Newby v. Van Oppen, etc., Manf. Co., L. R. 7, Q. B. 293; Scott v. Royal Wax Candle Co., 1 Q. B. D. 404; Westman v. Aktiebolaget, 1 Ex. D. 237. See Carron Iron Co. v. Maclarens, 5 House of Lds. 416; Same v. Stainton, 24 Beav. 346. The Supreme Court of New York has jurisdiction of an action brought by a citizen of the State against a foreign corporation in which the plaintiff is a stockholder, to restrain

illegal acts of the directors when they are personally within the jurisdiction of the court. Fisk v. Chicago, etc., R.R. Co., 4 Abb. Pr. N. S. 378. To warrant a suit against a foreign corporation there must be either a necessity or a fitness suggested by the peculiar circumstances. The cause of action, or the subject, or at least some property to be acted upon should have arisen or be situated within the jurisdiction. Cumberland Coal Co. v. Hoffman Coal Co., 30 Barb. 159. The statutes of New York provided that an action might be brought in certain courts of the State against a foreign corporation, 1st, by a resident of the State for any cause of action; 2d, by a plaintiff not a resident of the State when the cause of action should have arisen, or the subject of the action be situated within the State. If the action was against a foreign corporation for the recovery of money, and the corporation had property in the State, an attachment might be issued as security for the satisfaction of such judgment as the plaintiff

served upon foreign corporations so as to compel their appearance in any court, for the reason that they have no corporate existence within the realm, nor can they be compelled to appear by an attachment of their property. If,

might recover. In *Whitehead v. Buffalo, etc., R.R. Co.*, 18 How. Pr. 218, it was conceded that the action was not brought by a resident of the State, nor upon a contract made, executed, or delivered within the State, and it was decided to be against a foreign corporation. An attachment had been issued upon property of the defendant found within the State. It was held that the subject-matter of the action was the claim therein asserted, and not the property out of which satisfaction was sought; that the case did not come within the statute in relation to suits against foreign corporations, and that therefore the attachment must be discharged. In the foregoing case it appeared that the defendant was incorporated by an act of the Canadian Parliament, and that afterward it was authorized by an act of the New York legislature to take and hold real estate within the State, and declared to be a corporation under the general railroad act the same as if organized under such act, to possess the same privileges and franchises, and be subject to the same duties. In the decision it was assumed that the defendant was a foreign corporation, which seems to be contrary to the opinion in *Railway Co. v. Whittton*, 13 Wall. 270. When the only ground for an injunction is a supposed error on the part of the directors of a foreign corporation in making a dividend, the injunction will not be granted; the courts of a State not being authorized to regulate the affairs of a foreign corporation. *Howell v. Chicago, etc., R.R. Co.*, 51 Barb. 378. The courts of New York have no jurisdiction over a foreign corporation to

compel a distribution of the assets among the stockholders even where the trustees reside in the State, especially if no fraud is shown, and the directors are preparing to wind up the corporation in the mode directed by the stockholders, and not in violation of the laws of the State which created it. *Redmond v. Enfield Manf. Co.*, 13 Abb. Pr. N. S. 332. See *Carey v. Cincinnati, etc., R.R. Co.*, 5 Iowa, 357. A foreign corporation may be sued in Georgia if it have an agent there. *Macon v. Cummins*, 47 Ga. 321. It has been held in New Jersey to be the settled law of that State, that if a corporation makes a contract in a State other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in relation to that contract when summoned according to the laws of the State. *Nat. Condensed Milk Co. v. Brandenburgh*, 40 N. J. 111. See *Day v. Essex County Bank*, 13 Vt. 97. It was held in Pennsylvania in an early case, that the property of a foreign corporation in the State might be attached. *Bushel v. Com. Ins. Co.*, 15 Serg. & Rawle, 173. Under the statute of Massachusetts of 1839, providing for the attachment of the property of foreign corporations situated in the State, the word "property" includes effects and credits, and the form of attachment may be either by a common writ, or by process of foreign attachment, known as trustee process. The judgment in a trustee process against a resident debtor of a foreign corporation will be a bar to a suit in another State against such debtor at the instance of the principal defendant

therefore, they can be brought into court, it must be by virtue of some statute; and, unless the language of the law is clearly to the contrary, it will not be presumed that it was the intention of the legislature to subject to the process of our courts any corporation not within its territorial jurisdiction.¹ A foreign corporation which is the lessee of a domestic corporation, and exercises all of the functions and powers of the latter, may be subject to all of its duties and obligations. This must necessarily be so if the corporation is acting under a license granted by the State of the lessor. Under such circumstances it is to be treated as a corporation of the lessor's State *quoad hoc* the property under its control obtained by the lease, so far at least as its liability to citizens of that State is concerned. Parties having a right of action may sue in the courts of the lessor's State, and the corporation has no right to remove the suit to a Federal court. The lessee corporation derives all of its powers and privileges from the charter of its lessor, and is liable to answer in the courts of the State.² When the officers of a foreign corporation engage in business within the jurisdiction of another State, the corporation becomes amenable to the process of the latter State.³

in the trustee process. Ocean Ins. Co. v. Portsmouth R.R. Co., 3 Metc. 420. See Siloway v. Columbian Ins. Co., 8 Gray, 199; Larkin v. Wilson, 106 Mass. 120; Taft & Co. v. Mills & Co., 5 R. I. 393. A foreign corporation which has appeared in an action is, for the purposes of that action, as much within and subject to the jurisdiction of the court as if it was a corporation under the laws of the State. Dart v. Farmers' Bank of Bridgeport, 27 Barb. 337.

¹ Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

² Balt. & Ohio R.R. Co. v. Weightman, *supra*; Same v. Gallahue, 12 Gratt. 655.

³ People v. Cent. R.R. Co., 48 Barb.

478; Austin v. N. Y., etc., R.R. Co., 1 Dutcher, 381. One of the conditions of a charter may be that the corporation shall consent to be sued, which will be presumed, if it do business there. A State may make a corporation of another State, as there organized and conducted, a corporation of its own *quoad hoc* any property within its territorial jurisdiction. The question is always one of legislative intent, and not of legislative power or legal possibility. Balt. & Ohio R.R. Co. v. Harris, 12 Wall. 65. The fact that members and officers of a corporation reside in a different State from that in which it was incorporated, and that its books and papers are kept there, does not

§ 327. **Suits in the United States courts.**—For the purposes of jurisdiction in suits brought by and against corporations in the Federal courts under the provisions of the United States Constitution and the judiciary act of Congress, it must be made to appear that the corporation was brought into existence by the law of some State other than that of which the adverse party is a citizen, it being conclusively presumed that all of the stockholders are citizens of the State which by its laws created the corporation.¹ In *Cowles v. Mercer County*,² Chief Justice CHASE, in delivering the opinion, said : “It has never been doubted that a corporation all the members of which reside in the State creating it is liable to a suit upon its contracts by the citizens of other States; but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a State other than that of the plaintiff, and established within its limits, was a sufficient averment of jurisdiction. And in all cases prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough examination,³ and it was held that a corporation

change the domicile of such corporation. *Danforth v. Penny*, 3 Metc. 564.

¹ *Muller v. Dows*, 94 U. S. 445. In *Bank of U. S. v. Deveaux*, 5 Cranch, 61, it was decided that a corporation aggregate composed of citizens of one State might sue a citizen of another State in the Circuit Court of the United States; that although the artificial being was not a citizen as such, yet the court would look beyond the mere corporate character to the individuals composing it, and if they were citizens of a different State from the party sued, they were competent plaintiffs. “If,” said MARSHALL, J., “the corporation be considered as a mere faculty and not as a company of individuals who in transacting their joint concerns may

use a legal name, they must be excluded from the courts of the Union. But the court feels itself authorized by the case of the *City of London v. Wood*, 12 Modern, 669, to look, on the question of jurisdiction, to the character of the individuals who compose the corporation.” See *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Breithaupt v. Bank of Ga.*, 1 Pet. 238; *Com., etc., Bank of Vicksburg v. Slocumb*, 14 Id. 60; *Pond v. Vt. Valley R.R. Co.*, 12 Blatchf. 280; *Marshall v. Balt. & Ohio R.R. Co.*, 16 How. 314.

² 7 Wall. 118.

³ In *Louisville, etc., R.R. Co. v. Letson*, 2 How. 497. See *Marshall v. Balt. & Ohio R.R. Co.*, 16 How. 314; *Covington Drawbridge Co. v. Shepherd*, 20 Id. 227; *Osborn v. Bank of U. S.*, 9

created by the laws of a State, and having its place of business in that State, must, for the purpose of suit, be regarded as a citizen within the meaning of the constitution, giving jurisdiction founded upon citizenship." When a corporation has a charter from more than one State, it is deemed, as respects the jurisdiction of the circuit courts, a citizen of each State within the district of that State;¹ and the same rule holds good in the case of the consolidation of several corporations by the statutes of different States.² A national bank is regarded for the same purposes as a citizen of the State in which it is specially authorized to transact business.³ Section 629 of the revised statutes of the United States provides that "the circuit courts shall have original jurisdiction of all suits by or against any banking association established in the district in which the court is held, under any law providing for national banking associations." This gives the circuit courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties.⁴ In *Casey v. Adams*,⁵ the question was whether a national bank could be sued in a State court in a local action in any other county or city than that where the bank was located. *WAITE*, Ch. J., said : "Section 5136 (of the United States revised statutes) subjects

Wheat. 738; *Bank of U. S. v. Planters' Bank*, *Ibid.* 904; *Paine v. Indianapolis, etc.*, R.R. Co., 6 *McLean*, 395; *Com. v. Quicksilver Mining Co.*, 10 *Wall.* 553; *Railroad Co. v. Whitton*, 13 *Id.* 270; *Ohio & Miss. R.R. Co. v. Wheeler*, 1 *Black.* 297.

¹ *Railroad Co. v. Whitton*, 13 *Wall.* 283; *Ohio, etc., R.R. Co. v. Wheeler*, 1 *Black.* 286; *Balt., etc., R.R. Co. v. Gallahue*, 12 *Gratt.* 655. See *Culbertson v. Wabash Nav. Co.*, 4 *McLean*, 344.

² *Muller v. Dows*, 94 U. S. 445; *Quincy Bridge Co. v. Adams County*, 88 *Ill.* 615. See *Ohio & Miss. R.R.*

Co. v. Weber, 96 *Ill.* 443; *Matter of Sage*, 70 N. Y. 220; *Chicago, etc., R.R. Co. v. Auditor Genl.*, 53 *Mich.* 79.

³ *Nat. Park Bank v. Nichols*, 4 *Bissell*, 315.

⁴ *Kennedy v. Gibson*, 8 *Wall.* 498; *County of Wilson v. Nat. Bank*, 103 U. S. 770; *First Nat. Bank of Omaha v. County of Douglas*, 3 *Dillon*, 298. A foreign corporation by filing an answer, waives the right to be sued only in the district of the State where it was created. *Blackburn v. Selma, etc., R.R. Co.*, 2 *Flippin C. C.* 525; *Jones v. Andrews*, 10 *Wall.* 327.

⁵ 102 U. S. 66.

the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the banking act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves; and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for, would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress."¹

An averment in the original complaint that the defendant company is a foreign corporation, supplemented by an averment in a petition for removal, that it is a corporation created by and existing under the laws of a foreign State, covers the whole period from the commencement of the action to the application. It is not always necessary that the citizenship of the parties should be set out in the petition for removal, the requirements of the law being met if their citizenship is shown affirmatively by the record of the case. Upon filing the petition and bond, the suit being removable under the statute, the jurisdiction of the State court ceases, and that of the Circuit Court of the United States immediately attaches. The right of the company to have a trial in the Circuit Court of the United States thereupon becomes fixed. If the State court notwithstanding

¹ See Cooke v. Nat. Bank of Boston, 52 N. Y. 96.

rules that the right of removal does not exist, the corporation is not bound to desert the case, and leave the opposite party to take judgment by default. It is at liberty, its right to removal being ignored by the State court, to make defense in that court in every mode recognized by the laws of the State, without forfeiting or impairing its right to a trial in the court to which the action has been transferred, or without affecting to any extent the authority of the latter court to proceed.¹

In the Pacific Railroad Removal Cases,² the principal question involved was whether a suit brought in a State court against a corporation might be removed by such corporation into the Circuit Court of the United States on the ground that it was a corporation organized under a law of the United States. The plaintiff in error in four of the cases was the Union Pacific Railroad Company, and in the other three cases the Texas and Pacific Railroad Company. These railroad companies claimed that they had such a right of removal either under section 640 of the revised statutes of the United States, or under the act of Congress of March 3, 1875, entitled "An act to determine the jurisdiction of

¹ Steamship Co. v. Tugman, 106 U. S. 118. A corporation created by an act of South Carolina, executed under its seal its bond to A., for the payment of a specified sum of money. Subsequently, in consideration of forbearance on the part of the legal holder of the bond, it was indorsed payable to bearer, which indorsement was also sealed. It was held that the indorsement was a new and complete contract upon a distinct and sufficient consideration, and that, being payable to bearer, it was negotiable by delivery merely, notwithstanding it was an instrument under seal. C., the assignee of the bond, for the purpose of having a suit brought on it, transferred it to B., a non-resident of South Carolina, in con-

sideration of ten dollars paid, and an agreement to pay the balance remaining due when he should have collected the amount from the corporation. It was held that the delivery of the bond under the agreement mentioned was a transfer of the legal title to the bond; that B. could maintain an action in a United States court; and that a court of equity having jurisdiction for the purpose of enforcing the lien of the bond upon the corporate property would, in order to avoid a multiplicity of suits, extend its jurisdiction to give the plaintiff a remedy against individual stockholders if they were liable. Manf. Co. v. Bradley, 105 U. S. 175.

² 115 U. S. 2.

circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes." BRADLEY, J., delivering the opinion of the court, said : " We are of opinion that corporations of the United States created by and organized under acts of Congress, like the plaintiffs in error in these cases, are entitled as such to remove into the circuit courts of the United States, suits brought against them in the State courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits arising under the laws of the United States. We do not propose to go into a lengthy argument on the subject. We think that the question has been substantially decided long ago by this court. The exhaustive argument of Chief Justice MARSHALL in the case of Osborne v. Bank of U. S.,¹ delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States. That argument was the basis of the decision on the jurisdictional question in that case."²

¹ 9 Wheat. 738.

Ins. Co., 25 Minn. 534; Davis v. Cook,

² WAITE, Ch. J., and MILLER, J., 9 Nevada, 134.
dissenting. See Scheffer v. Nat. Life

CHAPTER XIX.

PROCEEDINGS IN SUITS BY AND AGAINST CORPORATIONS.

§ 328. Service in general of process on corporations. 329. Service of process on foreign corporations. 330. Appearance by corporation. 331. Parties plaintiffs. 332. Parties defendants. 333. Declaration or complaint. 334. Answer of corporation.	§ 335. Misnomer of corporation. 336. Denial of existence of corporation. 337. Proof required of corporate existence. 338. Admission of incorporation. 339. Admissions in general. 340. Corporate records. 341. Presumptive evidence.
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§ 328. Service in general of process on corporations.—Process can be served on a corporation only by making service on some one or more of its agents. A statute may, and ordinarily does, designate the agent or officer on whom this can be done, the corporation in such case being identified with the agent or officer for the purpose of such service, and being bound by it.¹ “At common law, the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer so as to secure that it came to the knowledge of the corporation, and then proceeding by distress. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation.”² Service on an agent who is casually within the jurisdiction will not bind the corporation. Therefore, under a statute which allows corporations to be sued in any county where

¹ *Lafayette Ins. Co. v. French*, 18 *How.* 404. 293. See *McQuin v. Middleton Manf. Co.*, 16 *Johns.* 5; *Beck v. Ashuelot Manf. Co.*, 4 *Allen*, 357.

² *BLACKBURN*, J., in *Newby v. Van Oppen, etc., Manf. Co.*, *L. R.* 7, *Q. B.*

they may have an agency or transact business, the service of a summons on a traveling agent of an insurance company authorized to effect insurance only, will be set aside.¹ When two corporations originally created by different States, are subsequently established by both States as a united corporation with one body of stockholders and one set of officers, it is not the less a domestic corporation in one of the States because it is a domestic corporation in the other, and the service of papers should be in the form prescribed by statute in the case of a domestic corporation.² Where a corporation has had a legal existence for the purpose of holding property, a writ of attachment levied on its property will not be affected by reason of the corporation becoming extinct by limitation subsequent to the levy and before the legal proceedings thereunder have terminated.³ Process may be served on an officer *de facto*.⁴

¹ Parke v. Com. Ins. Co., 44 Pa. St. 422. Process having been served on the conductor of a freight train, and judgment rendered by default, it was objected on appeal that it did not appear that the party served was the conductor of a train passing through the county where the suit was brought. It was held that it would not be presumed, without a showing to that effect, that the officer went out of his jurisdiction to serve process, or that he served it upon a wrong person. Ohio, etc., R.R. Co. v. Quier, 16 Ind. 440. Where a rule was granted that the cashier of a certain corporation pay the taxed bill of costs awarded against the corporation, or show cause why an attachment should not issue against him, it was held that showing cause that he was not personally responsible was good, and that a new order would be issued that the president, directors, and company show cause why a distraint should not issue to compel the payment. Worden v. Orange County

Bank, 1 Wend. 309. See Jones v. Boston Mills Corp., 4 Pick. 507. When the statute requires a summons in an action against a corporation to be left with a stockholder, if a creditor wishes to levy upon the property or body of a stockholder who is liable individually, there need not be any change in the form of the writ, or different recitals in the same. Holyoke Bank v. Goodman, etc., Co., 9 Cush. 576.

² Sprague v. Hartford etc., R.R. Co., 5 R. I. 233.

³ Lindell v. Benton, 6 Mo. 361. As to a return on the part of a corporation to a sheriff's writ, see Callahan v. Hallowell, 2 Bay S. C. 8.

⁴ Berrian v. Methodist Soc., 4 Abb. Pr. 424; McCall v. Byram Manf. Co., 6 Conn. 428. After all the property of a corporation has been placed in the hands of a receiver by a decree of the court, and the corporation enjoined against continuing business, neither the corporation nor the receiver can be charged by trustee process. Colum-

§ 329. Service of process on foreign corporations.—As already stated,¹ courts rendering personal judgments against foreign corporations, must have acquired jurisdiction over the party by personal service or voluntary appearance. “It was formerly held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were therefore necessarily confined to the disposition of such property belonging to it as could there be found; and to authorize them, legislation was necessary. In *McQueen v. Middleton Manf. Co.*,² the New York Supreme Court, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason, that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing, that if the president of a bank went to New York from another State, he would not represent the corporation there, and that his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character. . . . All that there is in the legal residence of a corporation in the State of its creation, consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain

functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without, as well as within, the State. There would seem therefore to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed, when it is called to legal responsibility for their transactions."¹

The object of all service of process for the commencement of a suit being to give notice to the party proceeded against, any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law.² The officer or agent upon whom the writ is served should be one who, properly speaking, represents the corporation for the purpose. In a suit brought in New Jersey to enforce a judgment against a corporation of that State, obtained in a court of New York by default on the service of process upon the president of the corporation when he was accidentally in New York, the company having no office or place of business in New York, it was held that such service did not give jurisdiction to the court in the latter State, and that a judgment thus obtained was not binding in New Jersey.³ In Michigan, service having been made on the treasurer of a foreign corporation under similar circumstances, the court said : "The corporate entity could

¹ St. Clair v. Cox, 106 U. S. 350, per FIELD, J.; Pennoyer v. Neff, 95 Id. 714; Am. Express Co. v. Conant, 45 Mich. 642.

² Gibbs v. Queen Ins. Co., 63 N. Y. 114; Pope v. Terre Haute Car Manf. Co., 87 Id. 137. See Estes v. Belford, 22 Fed. Rep. 275; New England Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138; Railroad Co. v. Koontz, 104 Id. 5; Desper v. Continental Water Meter Co., 137 Mass. 252; Thomas v. Placerville Gold Quartz Mining Co., 65 Cal.

600; Missouri Pacific R.R. Co. v. Collier, 62 Texas, 318; State v. Northwestern Endowment, etc., Assoc., 62 Wis. 174.

³ Moulin v. Trenton Ins. Co., 24 N. J. 222. When a foreign corporation brings an action for the sole purpose of a motion to set aside the service of a summons for want of jurisdiction, which motion is denied, if a review of the decision can be had on appeal, that is the proper remedy. State v. District Court, 26 Minn. 233.

by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representative of the company would be required to be here as the agent or officer of the company, and not as an isolated individual. In given cases the foreign corporation would be bound by service on its treasurer in this State, but this could only be so when the *treasurer*,—the then *official*,—the officer then in a manner representing the company, was served.”¹ Suit was brought upon a judgment rendered in New York against a railroad company which was a corporation of Kansas. A copy of the writ and petition was served upon a director of the company while he was temporarily in New York. The corporation had no office or place of business in New York. It was held that the service of process was ineffectual, and the judgment void.² An agent of an insurance company, in a place other than that where the company is located, who has power to receive premiums and to issue policies, and who, for that purpose, is supplied with an indefinite number of policies executed in blank, is a “managing agent” under the New York Code, on whom service of a summons and complaint against the company may be made.³ The local agent of a foreign express company, who

¹ *Newell v. Gt. Western R.R. Co.*, 19 Mich. 336. See *Pope v. Terre Haute Car Manf. Co.*, *supra*; *Good Hope Co. v. Railroad Barb Fencing Co.*, 22 Fed. Rep. 635; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. (3 Vroom) 15; *Benwood Iron Works v. Hutchinson*, 101 Pa. St. 359; *State v. District Court*, *supra*.

² *Latimer v. Union Pacific R.R. Co.*, 43 Mo. 105. An agent for the sale of tickets of a foreign railroad company having no property in the State, is not a managing agent upon whom the service of a summons and complaint can be made under the statute of New

York. *Doty v. Mich. Cent. R.R. Co.*, 8 Abb. Pr. 427. The captain of a steamboat is not the “managing agent” of the company owning the boat within the meaning of the statute of Wisconsin, in relation to the service of process. *Upper Miss. Transp. Co. v. Whittaker*, 16 Wis. 220. See *Baw-knight v. Liverpool, etc., Ins. Co.*, 55 Ga. 194; *Schmidlapp v. La Confiance Ins. Co.*, 71 Id. 246.

³ *Bain v. Globe Ins. Co.*, 9 How. Pr. 448. Suit against an insurance company in which the summons was served on one whom the plaintiff claimed was “a managing agent,” within section 134

has an office where he receives and forwards packages for the company, and does all the business of the company usually transacted in such receiving and forwarding offices, is a "managing agent," upon whom service of a summons may be made under section 68 of the Code of Ohio.¹ One who controls the business of a bank, makes out the reports which the law requires should be made to the comptroller, employs attorneys to defend suits against the bank, and appears to be the only person who exercises a general supervision over its affairs, is the "managing agent" of the corporation to receive service of process, though the bank has no president or cashier, and its affairs are being closed up.² When corporations avail themselves of the privilege of sending their officers and agents into other States, transacting business and making contracts there, they are justly regarded, so far as suits are concerned, as voluntarily placing themselves in the situation of citizens of the State whose comity they thus invoke.³ A State may impose, as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State it will accept as sufficient the service of process on its agents or persons specially designated. Such a condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall

of the New York Code; judgment by default. On a motion for an order to show cause why the judgment should not be opened by reason of irregularity of service, it was held that the company must show clearly what was the precise nature and extent of the agency, or the motion would not be granted. *Donadi v. New York, etc., Ins. Co.*, 2 E. D. Smith, 519.

¹ Am. Express Co. v. Johnson, 17

Ohio St. 641. In an action in Indiana against a railroad company for stock killed, it was held that, under the statute, service of process might be made upon the conductor of the train. *New Albany, etc., R.R. Co. v. Grooms*; 9 Ind. 243; *Same v. Tilton*, 12 Id. 3.

² *Carr v. Commercial Bank*, 19 Wis. 272.

³ *North Missouri R.R. Co. v. Akers*, 4 Kansas, 453.

be served on its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation.¹

The New York Code, sec. 432, provides that personal service of the summons upon a defendant being a foreign corporation, must be made by delivering a copy within the State as follows: 1. To the president, treasurer, or secretary; or if the corporation lacks either of those officers, to the officer performing corresponding functions under another name; 2. To a person designated for the purpose by a writing under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place within the State as the office or residence of the person designated; and if it is within a city, the street and street number, if any, or other suitable designation of the particular locality. It remains in force until the filing in the same office of a writ-

¹ *St. Clair v. Cox*, 106 U. S. 350; *Lafayette Ins. Co. v. French*, 18 How. 404; *MERCHANTS' MANF. CO. v. GRAND TRUNK R.R. CO.*; 63 How. Pr. 459. See *Williams v. Creswell*, 51 Miss. 817; *Block v. Atchison, etc., R.R. Co.*, 21 Fed. Rep. 529. In Pennsylvania, when a foreign corporation transacting business in the State has failed to establish an office and report the name of its agent to the secretary of state, but has a person residing in the State who acts as its agent, it will be presumed that the corporation has substituted such agent as one on whom service is authorized to be made to the extent at least of its unfinished business in the State. *Hagerman v. Empire State Co.*, 97 Pa. St. 534.

ten revocation of it, or of the consent, executed in like manner; but the person designated may from time to time change the place specified as his office or residence to some other place within the State, by a writing executed by him and filed in like manner. The secretary of state may require the execution of any instrument specified in this section to be authenticated as he deems proper, and he may refuse to file it without such authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution of it, and conclusive evidence of the authority of the officer executing it; 3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the State or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation within the State.

In Massachusetts, if a foreign corporation has established in the State an office where its principal officers are to be found, through whom the subordinate officers are directed and controlled, and where the corporation carries on such business as is done in the office of the president and treasurer of similar corporations, service may be made on the treasurer, and he may be summoned under trustee process; such an office being a "usual place of business" within the meaning of the statute.¹ Under the provisions of the act of Congress in relation to the District of Columbia, an action against a foreign corporation may be brought in the Supreme Court of the District when the corporate body has an established place of business in the District, process being served on the person who conducts the business of the corporation there.² The statute of Massachusetts of

¹ Nat. Bank of Commerce v. Hunt-
ington, 129 Mass. 444. See Barr v.

² Dallas v. Atlantic, etc., R.R. Co., 2
McArthur, 146. See Weymouth v.
Washington, etc., R.R. Co., 1 Id. 19;

1851 required that every foreign corporation before transacting business within the State should appoint, by a written power, some person resident therein its attorney, and provided that service of process upon such attorney should be deemed sufficient service upon his principal.¹

The statute of Pennsylvania provides that foreign insurance companies doing business in the State shall file a written stipulation agreeing that any legal process affecting the company served on the insurance commissioner, or on an agent appointed by the company to receive service of process, shall have the same effect as if served personally on the company within the State. A foreign insurance company having complied with this statute, and process having been served on such designated person, the company is "found" within the State for the purpose of bringing a suit against the company in the United States Circuit Court.²

City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Bawknigh v. Liverpool, etc., Ins. Co., 55 Id. 194. The history of legislation on this subject in New York shows the intention of the legislature to have been to make service within the State on the proper officer of a foreign corporation equivalent to personal service on a non-resident natural person, and if the person on whom service is to be made cannot be found within the State, publication is to be made in cases against foreign corporations as well as non-resident individuals, and jurisdiction is thereby acquired if either the individual or the corporation has property in the State, or the cause of action arises therein. So, too, the provisional remedy of attachment applies alike to non-resident individuals and to foreign corporations. Barnett v. Chicago, etc., R.R. Co., 4 Hun, 114. See Cunningham v. Pell, 5 Paige Ch. 607; Bank of Commerce v. Rutland, etc., R.R. Co., 10 How. Pr. 1; Libbey v. Hodgson, 9 N. H. 394.

¹ Thayer v. Tyler, 10 Gray, 164.

² Schollenberger, *ex parte*, 96 U. S. 369. See R.R. Co. v. Harris, 12 Wall. 65. It is the same in Alabama. Knott v. Southern Ins. Co., 2 Woods, 479. The constitution of Alabama, art. 14, sec. 4, requires that foreign corporations doing business in the State shall have at least one known place of business and one authorized agent or agents in the State, and subjects them to suit in any court where they may do business by the service of process upon the agent anywhere in the State. A foreign corporation which has complied with the foregoing regulation may plead the statute of limitations the same as a domestic corporation or resident citizen. Huss v. Cent. R.R., etc., Co., 66 Ala. 472. In Indiana it was held that the presence of the agent of a foreign corporation was not the presence of the corporation within the meaning of the act of Congress giving jurisdiction to United States courts, and that consequently

Section 10, article 15, of the constitution of Colorado declares that no foreign corporation shall do any business in the State without having one or more places of business and an authorized agent or agents therein upon whom process may be served. Section 213, p. 151, of the general laws is as follows: "Foreign corporations shall, before they are authorized or permitted to do any business in the State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged with the secretary of state and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served." It was held that a failure of a foreign corporation to comply with the terms of the statute, however it might affect its right to hold and enjoy property, did not affect its capacity to sue, but only extended to the exercise of the powers by which it might be said to ordinarily transact or carry on its business.¹

It was held in Indiana that policies issued and notes taken by foreign insurance companies in the State were not void because such companies had not complied with the statutes authorizing them to do business in the State, but that the remedy on such notes was suspended until compliance.² In Illinois foreign insurance companies cannot, without first complying with the laws of the State enacted for their regulation, make contracts in the State

the corporation was not "found" within the State. *Hume v. Pittsburg, etc., R.R. Co.*, 8 Bissell, 31, per GRESHAM, J. See *French v. Lafayette Ins. Co.*, 5 McLean, 46, aff'd s. c. 18 How. 404. A statute which provides for the service of process on a foreign corporation does not give any new right of suit or take away any of

the privileges of such corporation, unless it was clear that such was the intention of the legislature. *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. 15.

¹ *Utley v. Clark Gardner Lode Mining Co.*, 4 Col. 369.

² *Smith v. Little*, 67 Ind. 549; *Am. Ins. Co. v. Wellman*, 69 Id. 413.

which they can enforce.¹ The effect of section 8 of the act of Oregon of Oct. 21, 1864, restricting foreign corporations from doing business or making contracts in the State until they have filed the bond prescribed by the act, is to render a contract made in disregard of it void.²

To enforce a right of action against property, it must be within the jurisdiction of the court assuming to give judgment against it. When proceedings by attachment terminate in a judgment against the person of the defendant, they rest upon the same grounds as other actions *in personam*, and must disclose the same kind of service of process. If there is a failure in this, the judgment will not be recognized in other jurisdictions as extending beyond the property actually seized or levied upon.³ In proceedings *in rem*, when a court of admiralty has control over the thing itself, the court has jurisdiction whether the thing belongs to a domestic or a foreign corporation, or to a private individual. At common law the property of foreign corporations cannot be attached to compel their appearance. The authority, whenever it exists, results from special custom or statute. But this principle of the common law is not applicable to process and proceedings in courts of admiralty, their jurisdiction being as complete when the property is found within the district as when the person is found there, and they will, in proper cases, award attachments against the property of foreign corporations.⁴

¹ Cincinnati Mut. Health Assurance Co. v. Rosenthal, 55 Ill. 85.

² Bank of British Columbia v. Page, 6 Oregon, 431; *In re Comstock*, 3 Sawyer, 218; Semple v. Bank of British Columbia, 5 Id. 88.

³ Latimer v. Union Pacific R.R. Co., 43 Mo. 105; Barnett v. Chicago & Lake Huron R.R. Co., 4 Hun, 114; Bushel v. Com. Ins. Co., 15 Serg. & Rawle, 173; Warren Manf. Co. v. Aetna Ins. Co., 2 Paine C. C. 501.

⁴ Clarke v. N. J. Steam Nav. Co., 1 Story, 531. In the absence of any statute providing how notices shall be served on the corporation, if service cannot be made on the chief officer or managing agent, it may be made on any officer whose official relation to the governing body or managing agent or chief officer would make it his duty to communicate the notice to such body, agent, or officer. Fletzall v. Chicago & Alton R.R. Co., 77 Mo.

§ 330. Appearance by corporation.—The production of a warrant of attorney is not a necessary preliminary to the appearance of a corporation either as plaintiff or defendant; the universal and familiar practice of permitting members of the bar to appear without producing a warrant of attorney being as applicable to their appearance for a corporation as for a natural person.¹ It is incumbent upon every body politic not created by a public law of which the court is bound to take notice to show, if required, when it comes into court as a plaintiff, the authority under which it has assumed to act. When called upon as a defendant, its corporate capacity is thus admitted; it appears by attorney, and responds in the manner specially prescribed. The State being regarded in many respects as a body politic, when it becomes necessary to have it made a party to a litigation, it is represented by the attorney-general.²

§ 331. Parties plaintiffs.—As a general rule, an action at law must be brought by the person having the title or right to the thing demanded, or to the damages which are sought to be recovered for the injury.³ Hence, in the event of negligence or fraud on the part of directors, the corporation should bring the suit, and not individual stockholders. In such case it is the property of the corporation which has been misappropriated and lost, and whatever damages may be recovered belong to the corporate body.⁴ If for any

315. But the service of notice on a person who simply had desk room in the office of the corporation without any connection with its affairs would not be sufficient. *Same v. Kansas City, etc., R.R. Co.*, *Ib.* 482.

¹ *Osborn v. Bank of U. S.*, 9 Wheat. 738. See *McCormick v. Pa. R.R. Co.*, 49 N. Y. 303; *Atty. Genl. v. Guard., etc., Ins. Co.*, 77 Id. 272.

² *McKim v. Odom*, 3 Bland Ch. 407. In case of an attachment against the property of a foreign corporation the

court will permit the defendant to appear, and, on motion, will dissolve the attachment upon the giving by the corporation bail for the payment of the debt, interest and costs. *Bushel v. Com. Ins. Co.*, 15 Serg. & Rawle, 173.

³ *Flynn v. N. A. Life Ins. Co.*, 115 Mass. 449; *Ashuelot Manf. Co. v. Marsh*, 1 *Cush.* 507.

⁴ *Smith v. Hurd*, 12 Metc. 371; *First Nat. Bank v. Reed*, 36 Mich. 263; *Craig v. Gregg*, 83 Pa. St. 19; *Oakland Bank v. Wilcox*, 60 Cal. 126; *Oli-*

cause the corporation is unable to bring an action, or, when requested, refuses to do so, a ground will be laid for invoking the interposition of a court of equity in behalf of the stockholders.¹ When the cause of action as stated in the complaint relates to property belonging to a corporation as the absolute owner vested with the legal title, such corporation is the real party in interest to prosecute the action, though all of the stock may be owned by another corporation.² Where a note was made payable to "the cashier of the Commercial Bank, or his order," an action to enforce payment was held properly brought in the name of the bank, it not being denied that the property of the note was in the bank.³ A note having been made payable to the president, directors, and company of a corporation, and an action having been brought in the name of the corporation, it was held not to be such a variance as precluded a recovery, and that extraneous evidence might be given to

phant v. Woodburn Coal, etc., Co., 63 Iowa, 332; Tomlinson v. Bricklayers' Union, 87 Ind. 308; Evans v. Brandon, 53 Texas, 56; Einstein v. Rosenfield, 38 N. J. Eq. 309. When a trustee of a corporation misappropriates money, the remedy is by action at law, which is barred in six years. Pierson v. McCurdy, 33 Hun, 520.

¹ Allen v. Curtis, 26 Conn. 456; Greaves v. Gouge, 69 N. Y. 154; Brinckerhoff v. Bostwick, 88 Id. 52; Carter v. Ford Glass Co., 85 Ind. 180; Lehigh Coal & Nav. Co. v. Cent. R.R. Co. of N. J., 35 N. J. Eq. 349; Elkins v. Camden & Atlantic R.R. Co., 36 Id. 467, aff'd 37 Id. 273; Halsey v. Ackerman, 38 Id. 501. Where the charter of a railroad company is repealed and its franchises and property are assigned to another, and the company declines to resort to a remedy, a stockholder may maintain a suit for an injunction on the ground that the repealing stat-

ute impairs the obligation of a contract. Greenwood v. Freight Co., 105 U. S. 13. From the fact that in a judicial proceeding by or against a corporation it is the corporation in its corporate capacity that is a party, and not the individual stockholders, it has been held that a judge is competent to sit in the suit, though he is related to one of the stockholders within the prohibited degree. Scarborough T. Co. v. Cutler, 6 Vt. 315.

² Winona, etc., R.R. Co. v. St. Paul, etc., R.R. Co., 23 Minn. 359. In New Hampshire, when a grant of land has been made to a corporation under a certain name, and the legislature subsequently changes the name of the corporation, it has been the uniform custom to bring actions in the name given to the original grantees. Sunapee v. Eastman, 32 N. H. 470.

³ Commercial Bank v. French, 21 Pick. 486.

show who was interested in the note as payee.¹ Two incorporated companies may unite to enforce their rights by an action, whether of assumpsit to recover a sum of money deposited in a bank in their joint names, or otherwise.² A stockholder in a business corporation cannot sue in equity for relief against an injury done or threatened to the corporation of which he is a member, without alleging that the corporation or its officers are derelict in their duty. The appropriate party to maintain a suit for such injuries is the corporation itself, acting by its legal officers and managers. Should these officers refuse to perform their duty, then only can the stockholder resort to the courts for aid against the wrong-doer.³

It should appear in a petition filed by a stockholder that a right to maintain a suit for the wrong and injury set forth in his petition has accrued to him, either by reason of the refusal of the corporation to sue, or because the parties to be sued are under the control of the corporation.⁴ When

¹ *Newport, etc., Co. v. Starbird*, 10 N. H. 123. See *Leonardsville Bank v. Willard*, 25 N. Y. 574.

An action brought in the names of A., B., and C., trustees of the Ministerial Fund, is not brought by a corporation known as "The Trustees of the Ministerial Fund." *Bartlett v. Brickett*, 14 Allen, 62. A foreign corporation may sue in its own name, or in that of trustees appointed by a court to wind up its affairs. *Stewart v. U. S. Ins. Co.*, 9 Watts, 126.

² *New York, etc., Canal Co. v. Fulton Bank*, 7 Wend. 412. Corporations interested in a debt or other property, may unite in appointing an agent or agents to take care of their interests; and an action may be maintained in the name of the agent, as well as in that of the principals, if power to that effect be given. *Frazier v. Wilcox*, 4 Rob. La. 517.

³ *Morgan v. Railroad Co.*, 1 Woods,

15; *N. Y., etc., R.R. Co. v. Schuyler*, 17 N. Y. 592; *Talbot v. Scripps*, 31 Mich. 268.

⁴ *Brewer v. Boston Theatre*, 104 Mass. 378; *Heath v. Erie R.R. Co.*, 8 Blatchf. 347; *Ware v. Bazemore*, 58 Ga. 316; *Bulkley v. Big Muddy Iron Co.*, 77 Mo. 105. A stockholder must show that he has suffered real and substantial injury, and that he has exhausted all the means at his disposal to obtain within the corporation itself a redress of his grievances, before a court of equity will interfere and set aside a transaction of the corporation or of its directors. *Dimpfell v. Ohio, etc., R.R. Co.*, 110 U. S. 209. When a petition fails to set forth facts showing that the plaintiff is the proper party to maintain an action, if objection be not taken by the defendant, it will be deemed to have been waived. The decisions as to the meaning of the phrase

a person embarks his means in the enterprise of a corporation, he thereby agrees that its affairs shall be managed and controlled by such officers as the stockholders may designate, and so long as they conduct the corporate affairs in good faith and within the authority conferred by the charter, he has no ground to complain. But neither the directors nor the majority of the stockholders can do as they please with the property represented by the shares of the stockholders. They must not act fraudulently, nor must they exceed the powers conferred upon them by the law creating or governing the corporation. As a general rule a court of equity will enjoin on behalf of the stockholders of a corporation any improper alienation or disposition of corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises, as well as the improper management of the business of the corporation, or a wrongful diversion of the funds. So, if the managers of the corporation are about to engage in any enterprise not contemplated by the charter, or are proceeding to apply the corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere. In such cases, the court may grant relief at the suit of a single stockholder.¹ A single stockholder in a

"legal capacity to sue, have not been uniform. It may arise from some personal disability of the plaintiff, or from the fact that he has no title to the character in which he sues. There are cases which hold that it relates only to a legal incapacity, such as infancy, coverture, lunacy, and the like. But the better opinion is that it applies to all cases where the plaintiff, though having an interest in the subject of the suit, and the relief demanded, does not show a right to appear in court and demand such relief in his own name." Bulkley v. Big Muddy Iron Co., 77 Mo. 105, per HOUGH, C. J. And see Fug-

gle v. Hobbs, 42 Mo. 537; State to the use of Saline Co. v. Sappington, 68 Id. 454; Bliss Code, secs. 407, 408. Whether when fraud has been perpetrated by the directors of a corporation by which the property or interest of the stockholders is affected, they can come in and ask that their property shall be protected when it is shown that they will have no interest or property remaining after the relief prayed for is afforded, *quere*. Bayliss v. Lafayette, etc., R.R. Co., 8 Bissell, 193.

¹ Rogers v. Lafayette Agr. Works, 52 Ind. 296, per DOWNEY, J.

corporation has the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party not a stockholder possesses; but when he resorts to such proceedings to protect not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it.¹ The jurisdiction at the instance of a shareholder is to apply preventive remedies by injunction to restrain those who administer the affairs of the corporation from doing acts that would amount to a violation of the charter. It also extends to inquiry concerning and enjoining, as the case may require, individuals in whatever character they may assume to act, from prosecuting any course of conduct which is in violation of a corporate franchise, or in denial of a right growing out of it, when for the injury which will result, there is no adequate remedy at law. When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may, in an action, recover the amount misapplied; and when such misapplication has not been effected, but is threatened, he

¹ Detroit v. Dean, 106 U. S. 537, per FIELD, J., approving Hawes v. Oakland, 104 Id. 450. Although as a rule before a court of equity can interfere with the management of a corporation at the suit of a stockholder, it is necessary to show that the directors or managing officers having control of it have refused to act in its behalf. Yet if it

be shown that a corporation cannot safely be left to obtain relief in the usual manner, equity will interfere at the suit of a stockholder without proof of a demand upon the managing agents and their wrongful neglect or refusal to proceed. Finney v. Bennett, 27 Gratt. 365; Crumlish v. Shenandoah Valley R.R. Co., 28 West Va. 623.

may, by a bill in equity for an injunction, prevent it. So, when a corporation or its rights of property are threatened with an injury of such a nature as the court will enjoin, but it refuses to take any legal steps to protect itself, a stockholder may maintain a bill in equity against the party threatening the mischief and the corporation, to restrain by injunction the commission of the act, in order to protect his interest from immediate damage. But when a corporation has been injured by a tort or breach of a contract, or has any right of action legal or equitable against a party, an individual shareholder cannot prosecute that cause of action because the corporation fails or refuses to do so. It would be a doctrine attended with serious consequences if every individual shareholder, assuming the place of the corporation, could decide for it when actions should be brought to vindicate its supposed right. If a stockholder is aggrieved by the refusal of the board of directors to accept his views, his remedy is to unite with other stockholders and change those directors. But if irreparable mischief to his interests may ensue meantime, equity will administer preventive justice until such time as the will of the body of stockholders can be ascertained.¹ In *Hawes v. Oakland*,² MILLER, J., in delivering the opinion of the court, said : "We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization ; or such a fraudulent transaction completed or contemplated

¹ *Samul v. Holladay, Woolworth*, 400, ² 104 U. S. 450.
per MILLER, J.

by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders ; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders ; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by a court of equity. In addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court

of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."¹

In a suit brought by a creditor or a stockholder of a corporation against the directors for a fraudulent breach of trust, the corporation itself, if in existence, is a necessary party.² "Such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly, the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not on that of

¹ See *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Ph. 790; *McDougall v. Gardiner*, 1 Ch. D. 13; *Marsh v. Eastern R.R. Co.*, 40 N. H. 548; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre*, 104 Mass. 378; *Hersey v. Veazie*, 24 Me. 9; *Pond v. Vt. Valley R.R. Co.*, 12 Blatchf. 280; *McHenry v. N. Y., Pennsylv., etc., R.R. Co.*, 22 Fed. Rep. 130; *Leo v. Union Pacific R.R. Co.*, 19 Id. 283; *Cogswell v. Bull*, 39 Cal. 320; *Winsor v. Bailey*, 55 N. H. 218. See *Ramsey v. Gould*, 57 Barb. 398.

In *Cunningham v. Pell*, 5 Paige Ch. 613, 6 Id. 655, a suit in equity was brought by a creditor against the directors of a moneyed corporation to enforce their liability for a fraudulent breach of trust, and afterward the plaintiff amended his bill by inserting an allegation that it was filed also in behalf of all others standing in the same situation. It was held that a third person against whose right of

action at the time of such amendment the statute of limitations had run, so that he could not have filed the bill himself, could not come in and claim relief against the defendants upon the decree made upon such amended bill. It is inferable from that case that if the suit had originally been commenced by the plaintiff on behalf of himself and all others standing in the same situation, the action would not have been barred, as to any of the persons for whose benefit it was prosecuted, by any limitation of time. *Brinckerhoff v. Bostwick*, 99 N. Y. 185, reversing S. C. 34 Hun, 352.

² *Cunningham v. Pell*, 5 Paige Ch. 607; 6 Id. 655; *Smith v. Rathbun*, 66 Barb. 402; *Greaves v. Gouge*, 69 N. Y. 154; *Cicotte v. Anciaux*, 53 Mich. 227; *Charleston Ins. & Trust Co. v. Sebring*, 5 Rich. Eq. 342; *Black v. Huggins*, 2 Tenn. Ch. 780; *Wilkins v. Thorne*, 60 Md. 253.

the individual shareholder, and, if it be granted, the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question, in which the corporation is the essential party in interest, unless it is made a party to the litigation."¹ An assignee in bankruptcy of a corporation can enforce not only the rights which the corporation could have done if insolvency or bankruptcy had not supervened, but the rights of general creditors as well.² The fact that a contractor is a stockholder, does not prevent him from maintaining an action against the corporation on the contract.³ A civil suit cannot be brought against a corporation by the people of the State to decide the relative rights of different factions of officers, nor to determine the question of the validity of certain shares of stock claimed to have been illegally issued, unless the State itself is a stockholder. The people can only intervene upon the assertion of a distinct right on the part of the public in respect to the subject-matter litigated.⁴

When individuals voluntarily associate, and adopt the name or description intended to embrace all of the mem-

¹ Davenport v. Dows, 18 Wall. 626. In Dodge v. Woolsey, 18 How. 331, the plaintiff was a stockholder in a bank incorporated and doing business in Ohio. The defendant was about to collect, by distress, from the bank, certain taxes which were illegal. The plaintiff requested the bank to take legal steps to prevent this, but it declined to do so. The court held that the plaintiff could maintain his suit against the collector for an injunction, making the bank also a party. When a corporation is practically dissolved,

it need not be made a party. Ervin v. Oregon R.R. & Nav. Co., 20 Fed. Rep. 577. An agreement between A. and B., as owners of the W. Mills, to submit all claims between certain parties and the mill company to arbitration, does not make the mill company a party to the arbitration. Sawyer v. Winnegance, 26 Me. 122.

² Upton v. Englehart, 3 Dillon, 496.

³ Culbertson v. Wabash Co., 4 McLean, 544.

⁴ People v. Albany, etc., R.R. Co., 57 N. Y. 161.

bers, and under which their contracts and engagements are made and business carried on, the company can neither sue nor be sued by the name which it has adopted. The suit must be brought in the names of the individual members. A contract made with the company by its name, does not prove that it is entitled to sue by that name as a corporation aggregate; though if the contract stated on its face the fact that the company was duly incorporated, or that such was its corporate name, it would probably be sufficient evidence of the fact to authorize a recovery against the person making such admission.¹

§ 332. Parties defendants.—All persons whose rights may be affected by the litigation should be made parties.² In a suit brought by a corporation for the purpose of cancelling invalid certificates of stock, the claims under these instruments can be united and the holders of them be brought in without rendering the bill obnoxious to the charge of multifariousness.³ When the corporation itself is made a party defendant, it is improper to add the directors as parties when no personal claim or judgment is made or asked

¹ Covington Drawbridge Co. v. Shepherd, 20 How. 227; Williams v. Bank of Michigan, 7 Wend. 540.

² Hare v. London & Northwestern R.R. Co., 1 J. & H. 252; Ferguson v. Wilson, L. R. 2, Ch. 90; Clinch v. Financial Co., 4 Id. 117; Russell v. Wakefield Water Works Co., L. R. 20, Eq. 474; Abbot v. Am. Hard Rubber Co., 4 Blatchf. 489; Tyson v. Mahone, 1 Hughes C. C. 80; Bill v. Donohue, 17 Fed. Rep. 710. See Lewis v. Bank of Ky., 12 Ohio, 132. In an action against a bank for money had and received, a receiver of the bank cannot be joined when no demand is made or cause of action shown against him. Arnold v. Suffolk Bank, 27 Barb. 424. A railroad company was empowered by

statute to connect its road with any road legally authorized to pass within the limits of a certain city. In a suit to restrain the city from interfering with the company, it was held not competent to inquire into the strict legal right of the road with which the plaintiff was attempting to connect to be where it was; that the plaintiff could not be called on to prove the right of the other company as well as its own, which could only be contested in a direct proceeding against the other company, where the parties in it might have an opportunity to be heard in their own defense. Cleveland, etc., R.R. Co. v. Erie, 27 Pa. St. 380.

³ N. Y., etc., R.R. Co. v. Schuyler, 17 N. Y. 592.

against them.¹ When a suit is brought to restrain the infringement of a patent, the directors of a corporation who have the management and superintendence of the business, and under whose directions the articles infringed are manufactured and sold, may be made parties defendants.² The right of a corporation to recover for annoyance and discomfort to its members in the use of its property and the liability of the defendant to respond in damages for causing the annoyance, is not affected by the fact that the defendant is also a corporation. Legislative grants of privileges and powers to corporate bodies, railroad companies, for instance, confer no license to use them in disregard of the rights of others and with immunity for their invasion.³ The officers and servants of a corporation may be made parties to a suit for the purpose of eliciting from them a discovery on oath of the matters charged in the bill.⁴ So the court may call upon individual members of a corporation to answer under oath, but the person whose discovery is thus sought must be named in the bill as a defendant.⁵

§ 333. Declaration or complaint.—In a suit brought in the name of a corporation, it is not as a rule necessary to aver

¹ *Winch v. Birkenhead, etc., R.R. Co.*, 5 De G. & Sm. 562; *Allen v. N. J. Southern R.R. Co.*, 45 How. Pr. 14.

² *Goodyear v. Phelps*, 3 Blatchf. 91. See *Terhune v. Midland R.R. Co.*, 38 N. J. Eq. 423.

³ *Baltimore, etc., R.R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

⁴ *Arnold v. Suffolk Bank*, *supra*; *Wych v. Meal*, 3 P. Wms. 310; *McIntyre v. Union College*, 6 Paige Ch. 239; *Many v. Beekman Iron Co.*, 9 Id. 188; *Masters v. Rossie, etc., Mining Co.*, 2 Sandf. Ch. 301; *Lewis v. St. Albans, etc., Works*, 50 Vt. 477. As against an agent of the corporation it is a bill of discovery merely, and no decree of

relief can be founded on his answer, either against him or the corporation. The plaintiff may afterward use him as a witness, and the corporation will have the benefit of a cross-examination, or may disprove the matters contained in the answer. A motion that the corporation and its officers shall put in a joint answer will be denied. *Vermilyea v. Fulton Bank*, 1 Paige Ch. 37.

⁵ *Brumley v. Westchester Co. Manf. Soc.*, 1 Johns. Ch. 366. A corporation may be summoned and proceeded against as a garnishee upon proceedings under the Code of Virginia. *Balt. & Ohio R.R. Co. v. Gallahue*, 12 Gratt. 655. See *Holland v. Leslie*, 2 Harring. Del. 306.

in the declaration that the plaintiff is incorporated or that it has the right to sue in the name used, though in order to maintain the action, it may be necessary to prove these facts if the defendant appear and plead.¹ But it has been held that although when the plaintiff is a domestic corporation created by a public law, it may not be required to allege that it is a corporation, yet, when a foreign corporation sues, as the court cannot know judicially the name or legal being of such a body, it must be averred.² In such case the complaint need not, however, in general set out the act of incorporation or charter at large, or even state the title of the act or grant or the date of its passage ;³ unless, owing to the nature of the suit, it becomes necessary to do so to show a cause of action. Thus, in an action for libel brought by a foreign insurance company, it was held on demurrer that the plaintiff should have set out the charter at length in order that the court might determine whether the publication was false in stating the mode in

¹ Rees v. Conococheague Bank, 5 Rand. 326; Jackson v. Bank of Marietta, 9 Leigh, 240; Farmers', etc., Bank v. Troy City Bank, 1 Doug. Mich. 437; Bank of Utica v. Smalley, 2 Cowen, 770; Jackson v. Plumbe, 8 Johns. 378; Dutchess Cotton Manf. Co. v. Davis, 14 Id. 238; Bank of Michigan v. Williams, 5 Wend. 482; Bank of Waterville v. Belster, 13 How. Pr. 270; Lafayette Ins. Co. v. Rogers, 30 Barb. 491; Zion Church v. St. Peter's Church, 5 Watts & Serg. 215; Vance v. Bank of Indiana, 1 Blackf. 80; Emory v. Evansville, etc., R.R. Co., 13 Ind. 143; O'Donald v. same, 14 Id. 259; Heaston v. Cincinnati, etc., R.R. Co., 16 Id. 275; Light v. Everett Ins. Co., 5 Bosw. 716; Lewis v. Bank of Ky., 12 Ohio, 132; Miss., etc., R.R. Co. v. Gaster, 20 Ark. 455; Henriques v. West India Co., 2 Ld. Raym. 1532; Cent. Manf. Co. v. Hartshorne,

3 Conn. 199; Ewing v. Robeson, 15 Ind. 26. In New York "in an action against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation ; must state whether it is a domestic corporation or a foreign corporation ; and if the latter, the State, country, or government, by or under whose laws it was created. But the plaintiff need not set forth or specially refer to any act or proceeding by or under which the corporation was created." N. Y. Code, section 1775, Ed. of 1885. See Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85; Second Nat. Bank v. Wells, 53 How. Pr. 242; Candargua Academy v. McKechnie, 19 Hun, 62.

² Bank v. Simonton, 2 Texas, 531.

³ Holyoke Bank v. Haskins, 4 Sandf. 675.

which the company was authorized to do its business, which was the subject of the libel.¹ Where the legislature authorizes a municipal corporation to pass a certain by-law "if it finds it necessary," and it passes the by-law, and an action is brought for its violation, it is sufficient to set forth the by-law in the declaration, this being equivalent to an averment that the exigency arose and was adjudicated and acted upon.² The rule laid down by KYD on this point is: "In an action of debt for the penalty of a by-law, the time when the by-law was made, the parties by whom it was made, their authority to make it, the by-law itself, and the breach of it by the defendant, must be set forth."³ When the name of the corporation is changed between the time the cause of action arises and the beginning of the suit, the corporation can recover by its new name a debt due previous to the change.⁴ Averments

¹ Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87. In this case the court said: "A free criticism of the character of an insurance company or of any other incorporation which claims the confidence of the public, is to be encouraged rather than repressed as a means of public security; and if an insurance company has procured a charter which authorizes it to pay an interest of thirty per cent. per annum to its stockholders before laying by a fund for the security of its policy-holders, we certainly cannot hold a publication libellous merely because it assumes that the company will do for the profit of its stockholders that which it has obtained an express power to do, and because it argues that a company organized under such a charter must necessarily be unworthy of public confidence. This brings us to the precise question upon this record, namely, Does the charter of this company authorize it to do what the publication says it proposes to do? If it does, the publication cannot be

considered libellous. It would be merely a just criticism upon an objectionable charter and a proper caution to the public against trusting its money to a corporation which has obtained a legislative right so to use that money as necessarily to make the public insecure. If the charter contains no such authority and the company does not propose to do its business in that method, the publication may be libellous. Herein consists the fatal defect in the declaration. It nowhere purports to set out the charter, either in substance or in *hac verbo*."

² Stuyvesant v. New York, 7 Cowen, 585.

³ 2 Kyd on Corp. 167.

⁴ Northumberland County Bank v. Eyer, 60 Pa. St. 436. See Sunapee v. Eastman, 32 N. H. 470; Trustees, etc., v. Schwagler, 37 Iowa, 577; Racine County Bank v. Ayers, 12 Wis. 512; Gould v. Sub-district, etc., 7 Minn. 203; Eaton, etc., R.R. Co. v. Hunt, 20 Ind. 457. A suit in the corporate name

that the corporation was organized, and that "the board of directors of said corporation made assessments," substantially allege the existence of a board of directors.¹ Where the contract is to pay in such portions and at such times as the directors may require, agreeably to the act and by-laws, assigning as a breach the non-payment of an assessment made by the directors without alleging that it was made in conformity with the act and by-laws, and without averring the time at which payment was required by the directors, is bad on demurrer.² An act of incorporation provided that sixty days' notice should be given of each call, and be published in at least two newspapers. A count setting forth the days on which the assessments were severally made, and averring that the defendant had more than sixty days' notice of them, and was requested to make payment, was held a sufficient allegation of notice.³

omitting the words, "The president and directors," is properly brought. Milford, etc., Turnp. Co. v. Brush, 10 Ohio, 111. In a summons the defendants were named the president and directors of the Marine Bank, and in the declaration the Marine Bank. It was held no objection to the declaration on the ground of variance. *Marine Bank v. Biays*, 4 Har. & Johns. 338. See *McMinnville Academy v. Reneau*, 2 Swan, 94. A suit was brought by a bank by the name it had employed on bank bills it had issued. It being pleaded in abatement that this was not the corporate name of the bank, it was held that as the plaintiff had been led into the mistake by the defendant, the plaintiff would be allowed to amend without costs. *Bullard v. Nantucket Bank*, 5 Mass. 99. A conditional charter was granted certain parties to build a bridge under a specified corporate name, which charter expired by non-user, and the legislature afterward granted a new charter under a differ-

ent corporate name for the same purpose. A suit having been brought against the corporation by the name used in the expired charter, and the writ served by leaving a copy with the clerk of the existing corporation, it was held that the plaintiff might on motion amend by altering the name of the defendant, the defendant having the election of costs to that time or a continuance. *Sherman v. Conn. River Bridge Co.*, 11 Mass. 338.

¹ *Atlantic Mu. Ins. Co. v. Young*, 38 N. H. 451.

² *Ibid.* A contract not under seal signed by an agent in behalf of a corporation, may be declared on in an action at law as the agreement of the corporation made and signed by the agent of the corporation. *Many v. Beekman Iron Co.*, 9 Paige Ch. 188.

³ *Miss., etc., R.R. Co. v. Gaster*, 20 Ark. 455. In such case the mode of giving the notice being directory, it may be either by publication or by actual personal notice. *Ibid.*

When the action is brought by an individual for an injury to the corporation, the complaint should state that the constituted representatives of the corporation have been requested to bring the suit, and have declined to do so.¹ In *Talbot v. Scripps*,² the court said : "The wrong alleged will be seen to be a corporate wrong in which all the stockholders are proportionally interested, and any legal redress should be at the instance of the corporation, if the board of directors will consent to demand it. There is no allegation that the board has been requested to bring suit and has refused. Under the circumstances we know of no ground on which the suit can be maintained. As well might an individual stockholder bring suit to recover his share of corporate funds which had been lost by negligence or embezzlement, or his proportion of insurance money on the corporate property destroyed by fire. The injury counted on is not a separate injury to each of the stockholders, but a joint injury to all, and the corporation represents all for the purposes of legal remedy ; at least until it is shown that the corporate authorities refuse to act."

Where a statute provides that no stockholder shall be held personally liable for an indebtedness of the corporation unless a suit for its collection has been brought against the corporation within a year from the time it became due, in an action against a stockholder for such debt, it is necessary to aver that the provisions of the statute were complied with in this respect, notwithstanding the corporation is insolvent.³ In a suit in equity against a corporation it is

¹ *House v. Cooper*, 30 Barb. 157; *Hazard v. Durant*, 11 R. I. 195; *Ware v. Bazemore*, 58 Ga. 316; *Cogswell v. Bull*, 39 Cal. 320; *MERCHANTS'*, etc., *Line v. Waganer*, 71 Ala. 581; *Bulkeley v. Big Muddy Iron Co.*, 77 Mo. 105.

² 31 Mich. 268.

³ *Tarbell v. Page*, 24 Ill. 46. In Massachusetts, under the statutes of 1851

and 1852, it is not necessary, after judgment against a corporation, in order to proceed against stockholders upon whom service has been made, to aver in the declaration that they are stockholders, nor the grounds on which they are sought to be made liable, if they are chargeable. *Johnson v. Somerville*, etc., Co., 15 Gray, 216.

improper to join a claim for damages against individual defendants.¹ When, in a suit against a corporation, an officer of the corporation is made a defendant for the purpose of discovery merely, no relief either general or special should be prayed against him, and the bill should be so framed that it will distinctly appear that all the relief sought is intended to be confined to the other defendants, and that none will be asked against such officer at the hearing, even as to costs.²

§ 334. Answer of corporation.—On a petition for an injunction, a corporate body, when called upon, must answer all of the allegations of the bill, but can do so under no higher sanction than its corporate seal.³ It was held in an early case in the Supreme Court of the United States that when a bill against a corporation for an injunction is filed upon the oath of the complainant, if the answer by the corporation is put in under its common seal unaccompanied by an oath, its weight is very much lessened, if not entirely destroyed, as matter of evidence, and is to be regarded merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the plaintiff to proof of such allegations.⁴ The statute of New York of 1850, which prohibits corporations from pleading usury in defense, applies to foreign as well as to domestic corpora-

¹ House v. Cooper, *supra*; Winsor v. Bailey, 55 N. H. 218; Smith v. Rathbun, 22 Hun, 150. See Merchants', etc., Line v. Waganer, *supra*.

² McIntyre v. Union College, 6 Paige Ch. 239; Many v. Beekman Iron Co., 9 Id. 188.

³ Haight v. Morris Aqueduct, 4 Wash. C. C. 601; Fulton Bank v. New York Canal Co., 1 Paige Ch. 311. See Baltimore R.R. Co. v. Wheeling, 13 Gratt. 40; Bouldin v. Baltimore, 15 Md. 18; Bronson v. La Crosse, etc., R.R. Co., 2 Wall. 283.

⁴ Union Bank v. Geary, 5 Pet. 99. If the plaintiff wishes to have a sworn answer, he must make some of the officers or members of the corporation parties. It has been held that when the answer of the corporation is not verified by affidavit, it is not evidence for the defendant, though responsive to the bill. But it has the effect of putting the allegations to which it responds in issue, and of imposing on the plaintiff the burden of proving them. Balt., etc., R.R. Co. v. Wheeling, 13 Gratt. 40.

tions;¹ but not to individual indorsers and sureties on a note given by a corporation, they being sureties of the borrower, and as such embraced in the term "borrower" in the usury law of 1837.² In a suit against a corporation the answer of an individual stockholder, though in the name of the corporation, cannot be regarded as the answer of the corporation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer, or stipulations that might be entered into by the parties, or by their counsel. When the directors of the corporation refuse to appear and defend a bill filed against them, the court in its discretion will permit a stockholder to become a party defendant for the purpose of protecting his interests against unfounded and illegal claims; but in such case his defense will be independent of the corporation, and he be a real and substantial party to the extent of his interest, and that of such of the stockholders as may join with him. A cross bill filed by a stockholder in the name of the corporation without leave of court, is irregular, and will be set aside on motion.³

At common law, where a corporation became extinct by a voluntary surrender of its charter, and an acceptance of such surrender by the legislature, or when a final judgment was rendered upon a *quo warranto* against the corporation

¹ Southern Ins. Co. v. Packer, 17 N.Y. 51.

² Hungerford's Bank v. Dodge, 30 Barb. 626. The above decisions were followed by the court in Pennsylvania in an action on a contract made in New York. Bock v. Lauman, 24 Pa. St. 435. See Butterworth v. O'Brien, 28 Barb. 187; s. c. 23 N. Y. 275; *In re Wild*, 11 Blatchf. 243. Whether the statute did not operate to render a transaction with a corporation valid which but for the statute would have

been usurious and void so that third persons could not in such case allege usury and claim that the transaction conferred no title upon the lender, *quere*. Scott v. Johnson, 5 Bosw. 213.

³ Bronson v. La Crosse, etc., R.R. Co., 2 Wall. 283. The complainant can compel a corporation to appear and answer by a writ of *distringas*; or he may join with the corporation a director or officer if he desires a discovery under oath. Ibid.

declaring its franchises and privileges forfeited, and decreeing a seizure and resumption of the same by the government, a suit pending against it at the time, abated by operation of law, and the attorney for the corporation might suggest its extinction by plea or otherwise on the record.¹ It is now, however, otherwise provided by statute in many if not in most of the States.²

§ 335. Misnomer of corporation, how taken advantage of in pleading.—A corporation should sue and be sued by its correct name, the same as an individual;³ though it has been held that if the name in the declaration is substantially but not precisely the same as in the charter, it will be sufficient.⁴

¹ Greely v. Smith, 3 Story, 657. See Moultrie v. Smiley, 16 Ga. 289; Lindell v. Benton, 6 Mo. 361; Merrill v. Suffolk Bank, 31 Me. 17; Saltmarsh v. Planters' Bank, 17 Ala. 761; Rankin v. Sherwood, 31 Me. 509.

² Blake v. Portsmouth R.R. Co., 39 N. H. 435; Stetson v. City Bank, 2 Ohio St. 167; Woolsey v. Judd, 4 Duer, 379; Michigan State Bank v. Gardner, 15 Gray, 362; Ingraham v. Terry, 11 Humph. 572. If a corporation has a right to sue at the commencement of the action, the fact of its dissolution before trial is not material. Agnew v. Bank of Gettysburg, 2 Harr. & Gill, 478. Where in an action against a corporation the allegations of one count of the complaint went to show that the defendant was never incorporated, but the complaint averred other facts which, if true, showed that the defendant had forfeited its charter, a demurrer to the whole complaint was held bad. People v. Ravenswood, etc., Co., 20 Barb. 518, CLERKE, J., dissenting.

³ Mr. Kyd (Corp., vol. I, p. 254) remarks that "It is said that if a corporation be known by a name, it is sufficient to sue by that name. But this

seems to be confined to the case of a corporation by prescription; for it is said on another occasion that when the corporation is created by the king, and the commencement of it appears by record, it can have no other name by use, nor be named otherwise than as the king by his letters patent has appointed, and the court will not permit it to be sued by another name. Yet I see no reason why, in the case of a corporation by charter which has acquired by long usage a name of reputation different from its real name of foundation, it may not be sued by that name of reputation, as well as a man may be sued by a name of reputation different from his name of baptism, or why, if the corporation plead a misnomer, the plaintiff may not reply that it is known by the one name as well as by the other." When a deed is made to a corporation by a wrong name, the corporation may sue in its true name, and aver in the declaration that the defendant executed the deed to it by the name mentioned in the deed. N. Y. African Soc. v. Varick, 13 Johns. 38.

⁴ Kentucky Seminary v. Wallace, 15 B. Mon. 45. See Clark v. Potter County, 1 Pa. St. 163; Romeo v. Chap-

An action by a corporation aggregate to recover a thing due to it, must not be brought in the name of its head alone, but in its full corporate name, unless it appears that its charter permits it to sue in the name of its head.¹ The misnomer of a corporation is not ground for nonsuit; the objection, whether applicable to the plaintiff or defendant, must be made by a plea in abatement.² A plea that there is not, nor on the day of the issuing of the writ, nor even since, was there such a corporation, is a plea in bar, and to allow the filing of such plea after issue joined and trial had upon non-assumpsit, is error.³

man, 2 Mich. 179; *Thatcher v. West River Nat. Bank*, 19 Id. 196; *Brittain v. Newland*, 2 Dev. & Batt. 363; *Insane Asylum v. Higgins*, 15 Ill. 185; *Virginia, etc., Steam Nav. Co. v. U. S.*, *Taney*, 418; *Coulter v. Trustees, etc.*, 29 Md. 69; *Sherman v. Proprietors*, 11 Mass. 338; *Hoboken Building Assoc. v. Martin*, 2 Beasley N. J. 427; *Bradford v. Water Lot Co.*, 58 Ga. 280; *People v. Potter*, 35 Cal. 110; *Marine Bank v. Biays*, 4 Harr. & Johns. 338. Where an action is brought in the name of the trustees of a religious corporation, a slight variance in the corporate name is not essential; for in such case it is the trustees and not the corporation as such that bring the suit. *People v. Runkel*, 9 Johns. 147. Where, however, a sheriff having served a writ, brought an action for his fees against "The President and Trustees of the Savings Bank for the county of Strafford," it was held improper to introduce in evidence a copy of a writ and execution in favor of "The Savings Bank for the county of Strafford." *Burnham v. Savings Bank*, 5 N. H. 446.

¹ *I Kyd on Corp.* 255.

² *Bank of Utica v. Smalley*, 2 Cowen, 770; *Bank of Metropolis v. Orme*, 3 Gill, 443; *Gilbert v. Nantucket Bank*,

5 Mass. 97; *Medway Cotton Manf. v. Adams*, 10 Mass. 360; *Burnham v. Savings Bank*, 5 N. H. 446; *Sunapee v. Eastman*, 32 Id. 470; *Hoereth v. Franklin Mill Co.*, 30 Ill. 151; *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358; *Stone v. Berkshire Soc.*, 14 Vt. 86; *State v. Telephone Co.*, 36 Ohio St. 296; *Lake Superior Building Assoc. v. Thompson*, 32 Mich. 293; *School Dist. v. Griner*, 8 Kansas, 224; *Wilson v. Baker*, 52 Iowa, 423; *Whittlesey v. Frantz*, 74 N. Y. 456; *N. Y. Code*, sec. 1777. An act changing the corporate name, pending a suit by the corporation, creates no obstacle to the continuance of the suit, especially where a subsequent act provides that the corporation shall not lose any of its powers, rights, or privileges by the change. *Thomas v. Visitors of the Frederick County School*, 7 Gill & Johns. 369.

³ *Northumberland County Bank v. Eyer*, 60 Pa. St. 436. In New York, in an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf. *N. Y. Code*, sec. 1777. See *Whittlesey v. Frantz*, 74 N. Y. 456. When the writ

§ 336. Denial of existence of corporation.—When by statute a corporation plaintiff is bound to prove under the general issue that it is a corporate body, a plea that no corporation of the kind exists is bad on special demurrer, as whatever the plaintiff is required to prove in the first instance, in order to support his cause of action, cannot be specially pleaded by the defendant. This principle applies as well to foreign as to domestic corporations.¹ There is no rule of pleading more universal than that by pleading to the merits the defendant admits the capacity of the plaintiff to sue; and there seems to be no reason why a corporation should be placed on a different footing in this respect from a natural person.² It is accordingly held in many of the States, that the existence of a corporation plaintiff being a question preliminary in its character, like all questions as to the person or character in which a plaintiff sues, an objection that there is no such corporate body cannot be made under the general issue, but must be pleaded in an earlier stage of the cause.³ In Massachusetts, if the defendant, when he

contains one name for the plaintiff corporation, and the declaration gives another name, and states that the name in the writ is an error, there is such a variance as will defeat the action if properly pleaded. *Beene v. Cahawba, etc., R.R. Co.*, 3 Ala. 660.

¹ *Bank of Auburn v. Weed*, 19 Johns. 300; *Farmers'*, etc., *Bank v. Rayner*, 2 Hall, 195; *Welland Canal Co. v. Hathaway*, 8 Wend. 481. The New York revised statutes provide that in suits brought by or against any corporation created by any statute of the State, it shall not be necessary to prove on the trial the existence of the corporation unless the defendant shall have alleged in his answer that the plaintiff or defendant, as the case may be, is not a corporation. *Nul tiel corporation* thereupon became a good special plea; whereas formerly, as we have

seen, it would have been demurrable as amounting to the general issue. As the provision does not apply to corporations not created by a statute of the State, foreign corporations must prove their corporate existence the same as before. *Bank of Waterville v. Beltser*, 13 How. Pr. 270; *N. Y. Nat. Exchange Bank v. Jones*, 9 Daly, 248. See *Southold v. Horton*, 6 Hill, 501.

² *Prince v. Commercial Bank*, 1 Ala. 241.

³ *Brown v. Illius*, 27 Conn. 84; *West Winsted Savings Bank v. Ford*, Ib. 282; *Litchfield Bank v. Church*, 29 Id. 137; *School Dist. v. Blaisdell*, 6 N. H. 197; *Concord v. McIntire*, Ib. 527; *Methodist Church v. Wood*, 5 Ohio, 283; *Jones v. Bank of Tenn.*, 8 B. Mon. 122; *Whittington v. Farmers' Bank*, 5 Har. & Johns. 489; *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358;

files his plea, gives notice that he will deny the corporate existence of the plaintiff, he is entitled to that defense, otherwise not.¹ A demurrer to a complaint that it does not state facts sufficient to constitute a cause of action, when the objection is that it is not alleged in the complaint that the plaintiff is a corporation, is bad. The objection should be taken by answer.² In New York, in an action by or against a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation.³ An answer that the plaintiff has not complied with the provisions of the act entitled an act respecting foreign corporations, states no substantive facts, but an unsupported conclusion. Such a plea is bad, either as a plea in abatement or in bar. It is the duty of the pleader to allege what acts his adversary has done or omitted to do, and leave the court to determine whether there has or has not been a compliance with the statute.⁴ If a corporation is shown to have once existed, an answer denying its existence should particularly set forth the manner in which the corporate powers ceased.⁵

Northumberland County Bank v. Eyer, 60 Id. 436; Lehigh Bridge Co. v. Lehigh Coal, etc., Co., 4 Rawle, 9; Aetna Ins. Co. v. Peck, 28 Vt. 93; Savage Manf. Co. v. Armstrong, 17 Me. 34; McIntire v. Preston, 5 Gilman, 48; Soc. for the Propagation of the Gospel v. Pawlet, 4 Pet. 480; Hardy v. Merriweather, 14 Ind. 203; Hargrave v. Bank of Illinois, 1 Breese, 84; Jones v. Cincinnati Type, etc., Co., 14 Ind. 89; Hubbard v. Chappel, Ib. 601; Monumoi Gt. Beach v. Rogers, 1 Mass. 159; Roxbury v. Huston, 37 Me. 42; Orno v. Wedgewood, 44 Id. 49; Aldermen, etc., v. Finley, 10 Ark. 423.

¹ Christian Soc. v. Macomber, 3

Metc. 235; Williams v. Cheney, 3 Gray, 220. See Hungerford Nat. Bank v. Van Nostrand, 106 Mass. 559.

² Irving Nat. Bank v. Corbett, 10 Abb. Pr. N. C. 85.

³ N. Y. Code, sec. 1776.

⁴ Singer Manf. Co. v. Effinger, 79 Ind. 264. See Jones v. Bank of Tenn., 8 B. Mon. 122.

⁵ Heaston v. Cincinnati, etc., R.R. Co., 16 Ind. 275, overruling Morgan v. Lawrenceburg, 3 Id. 285. When, as a legal and necessary consequence of certain acts, a company has ceased to have a corporate existence, and an individual claims that he has thereby been injured, or that certain benefits have thereby resulted to him, he may,

Notwithstanding some irregularities may have occurred in the organization of a corporation, if no act constituting a condition precedent to the existence of the corporation has been omitted, a party dealing with the corporate body cannot set up an irregularity. The courts are bound to regard the body as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of government.¹ Under a writ of entry by the grantee of a corporation to recover a piece of land, it being shown that the grantor had received a conveyance of the premises under the corporate name before either of the parties had any claim thereto, and that it was then carrying on business as a corporation, it was held that an objection that the grantor was not a corporation, could not avail the tenant whom it was sought to dispossess, and who himself relied upon a conveyance from the corporation to secure him a prior title.² After judgment in behalf of a corpora-

by averring these facts, have his remedy, and need not, in the first instance, institute a proceeding, and have it declared that the corporate existence has ceased. If a company never had any corporate existence, so as to enable it to take and hold property in the name of a corporation, that fact, and the sufficiency of a transfer, may be inquired into in a collateral proceeding in relation to property which it claims to hold. *Carey v. Cincinnati, etc., R.R. Co.*, 5 Iowa, 357.

¹ *Frost v. Frostburg Coal Co.*, 24 How. 278; *Vermont v. Society, etc.*, 1 Paine C. C. 652; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Thompson v. N. Y. & Harlem R.R. Co.*, 3 Sandf. Ch. 625; *Jones v. Bank of Tenn.*, 8 B. Mon. 122; *Vernon Soc. v. Hills*, 6 Cowen, 23; *Cochran v. Arnold*, 5 Pa. St. 399. Notwithstanding serious objections to the validity of an act of incorporation, the fact that it has been in operation fourteen years, that its valid-

ity has been passed upon by the highest judicial tribunal of the territory in which the body exists, and that the plaintiff has acted as president of the corporation, are sufficient grounds for leaving the act undisturbed. *Williams v. Bank of Michigan*, 7 Wend. 540. In a suit by a creditor of a corporation against a stockholder the defendant cannot set up in defense irregularities in the corporate organization, the right of a corporation to sue and liability to be sued not being subject to be inquired into collaterally. *Eaton v. Aspinwall*, 19 N. Y. 119. See *Center, etc., T. Co. v. McConaby*, 16 Serg. & Rawle, 140.

² *Dooley v. Wolcott*, 4 Allen, 406. When a person is in possession of real estate under a lease duly made by a board of trustees elected under color of right, they must be regarded with reference at least to this portion of the lands of the corporation, as trustees *de facto*, and, until they are ousted, an

tion the defendant in any proceeding thereon will be estopped from denying that it was a corporation at the time of the entry of the judgment.¹

§ 337. Proof required of corporate existence.—If the act of incorporation is a public law, the courts will take judicial notice of it; but a charter which is conferred by a private statute must be proved.² When issue is joined on the existence of a corporation in a suit to which it is a party, it is sufficient, as a rule, to produce the charter and show user under it.³ But where a corporation is formed under the

action of ejectment cannot be maintained against their tenant, but the court will be bound to protect him in his possession. *Jackson v. Nestles*, 3 Johns. 115. The fact that a corporation has officers *de facto* is sufficient to sustain its existence as to strangers, although there has been an omission to continue, by an election, the succession to certain offices. *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9.

¹ *Williams v. Bank of Michigan*, *supra*; *Hubbard v. Chappel*, 14 Ind. 601. After a verdict in favor of a corporation, it will be presumed that its capacity to sue was conceded or proved at the trial if no exception is taken on that ground. *British Am. Land Co. v. Ames*, 6 Metc. 391.

² *Stribling v. Bank of the Valley*, 5 Rand. 132; *Aldermen, etc., v. Finley*, 10 Ark. 423; *Hays v. Northwestern Bank*, 9 Gratt. 127; *State v. Vincennes University*, 5 Ind. 91; *Anderson v. Kerns Draining Co.*, 14 Id. 199; *Holloway v. Memphis, etc., R.R. Co.*, 23 Texas, 465. The fact of incorporation may be shown by the printed laws of a State in which the charter is published. *Bank of Wilmington v. Wollaston*, 3 Harring. Del. 90. In Iowa, all acts of incorporation are declared public, and when nothing appears in the record to the contrary, the fact of incorporation

is a legal presumption. *Durham v. Daniels*, 2 Greene, 518. And see *Worcester Med. Inst. v. Harding*, 11 Cush. 285. A promissory note made payable at "Hungerford National Bank, Adams," does not necessarily indicate a corporation established under that name, and in a suit by the bank on such a note which had been indorsed to it by the payee, in which the answer denied all the allegations of the declaration, it was held that the plaintiff was put to the proof of the fact of its corporate existence. *Hungerford Nat. Bank v. Van Nostrand*, 106 Mass. 559. When the title to land is vested in trustees in trust for a corporation, and the trustees bring ejectment in their own names, but add "in trust for the company," this does not render it necessary for them to prove the incorporation of the company. *Wolf v. Goddard*, 9 Watts, 544. In Mississippi, trustees of school lands, although not incorporated by a particular name, are nevertheless *quasi* corporations, and must prove their right to sue. The reason is, not that the cause of action depends on their character as a corporation, but because the remedy depends upon it, and can only be enforced by persons competent to sue. *Carmichael v. Trustees, etc.*, 3 How. Miss. 84.

³ *Society, etc., v. Young*, 2 N. H.

provisions of a general law its existence must be proved by showing at least a substantial compliance with the requirements of the statute.¹ In an action by a railroad company to enforce the payment of a subscription to its stock, it is sufficient under a general act for the formation of corporations to prove that the papers filed by which the corporation is sought to be created are colorable, and acts of user; thereby showing a corporation *de facto*.²

310; Scarsburgh T. Co. v. Cutler, 6 Vt. 315; Sampson v. Bowdoinham Mill Co., 36 Me. 78; Came v. Bingham, 39 Id. 35; Utica Ins. Co. v. Tilman, 1 Wend. 555; Same v. Cadwell, 3 Id. 296; Fire Dept. v. Kip, 10 Id. 266; Meth. Epis. Church v. Pickett, 19 N. Y. 482; Wilmington, etc., R.R. Co. v. Thompson, 7 Jones N. C. 387. In Massachusetts, charters granted by the legislature, including an act consolidating two distinct railroad corporations into one under a new name, were held *prima facie* evidence of the existence of a corporation *de facto*, and of its ownership, possession, and management of the road. Com. v. Bakeman, 105 Mass. 53. In an action by a creditor to recover from an individual stockholder the amount of an execution obtained against the corporation, it is necessary, if required, that the existence and organization of the corporation should be proved, which may be done by the corporate records duly authenticated. If books have not been kept or are not accessible to the party upon whom the affirmative lies, an acceptance of the charter may be shown by implication from the acts of the corporation if such acts are capable of proof. Hudson v. Carman, 41 Me. 84. See Gray v. Turnpike Co., 4 Rand. 578. The fact that the books show the election of corporate officers is *prima facie* sufficient to prove that the body was duly incorporated. Wood v. Jefferson County Bank, 9 Cowen, 194.

¹ Mokelumne Hill Co. v. Woodbury, 14 Cal. 424; Patterson v. Arnold, 45 Pa. St. 410; Washington Mut. Ins. Co. v. Chamberlain, 16 Gray, 165. Showing the appointment by the governor of inspectors of a turnpike road and their certificate that the road is completed and gates erected, is not sufficient to establish the corporate existence of a turnpike company. Bill v. Fourth Ct. Western Turnpike Co., 14 Johns. 416. When an association becomes incorporated under a general act, a certificate authenticated by the seal of the State and apparently conformable to the public act, is sufficient to show its organization; and no subsequent faults or omissions which would work a forfeiture can be made available to defeat an action on a contract with a corporation which was once legally constituted. Eagle Works v. Churchill, 2 Bosw. 166.

² Buffalo, etc., R.R. Co. v. Cary, 26 N. Y. 75, ALLEN and SUTHERLAND, JJ., dissenting. As against a party who has dealt with a corporate body, the production of the original certificate of incorporation with a clerk's certificate thereon that it is recorded in the county clerk's office, and proof of user, are sufficient to show corporate existence without proving that a copy of the certificate has been filed with the secretary of state. Leonardsville Bank v. Willard, 25 N. Y. 574.

The fact that a statute provides that the copy of a certificate of incorporation filed in pursuance of the act, certified by the county clerk or his deputy to be a true copy, shall be received in all courts and places as presumptive evidence of what is therein stated, does not necessarily exclude every other method of proving the incorporation.¹ The charter of a foreign corporation must be proved like any other material fact, the courts of the State not being presumed to be acquainted with foreign charters.² A copy of the charter of such a corporation certified to be a true copy by the secretary of state, with the seal of the State which granted the charter, is admissible in evidence, and, with proof of user, is sufficient to show the organization of the corporation.³ If the plaintiff would rely upon the fact that the defendant, a foreign corporation, has failed to organize according to the laws of its own State, or that it has by virtue of those laws forfeited its charter, the particular statute or statutes relied upon should be set out in order that the court may judge of the legal provisions, the courts of one State not taking judicial notice of the statutes of another State.⁴ Proof that a company attempted

¹ New York Car Oil Co. v. Richmond, 6 Bosw. 213. The subscription-book signed by the defendant, which recites the formation of the corporation under a general railroad act, and that the necessary affidavits showing due compliance with the law were filed, is sufficient proof of the corporate existence of the plaintiff. Black River, etc., R.R. Co. v. Clarke, 25 N. Y. 208. When it is a condition precedent to the legal organization of a corporation that a certain number of shares shall be subscribed, although testimony that a number of shares were taken by persons not primarily responsible for them is improper, yet evidence may be given tending to show that subscriptions were not made in good faith. The declara-

tion of a subscriber in reference to his subscription made after the corporation has organized, is not admissible upon the question whether the corporation acted in good faith at the time of its organization. Penobscot R.R. Co. v. White, 41 Me. 512.

² U. S. Bank v. Stearns, 15 Wend. 314; Savage Manf. Co. v. Armstrong, 17 Me. 34; Lewis v. Bank of Ky., 12 Ohio, 132; Marine, etc., Bank v. Jauncy, 1 Barb. 486.

³ State v. Carr, 5 N. H. 367; U. S. v. Johns, 1 Wash. C. C. 363; S. C. 4 Dallas, 412; Farmers', etc., Bank v. Troy City Bank, 1 Doug. Mich. 437; Pacific Guano Co. v. Mullen, 66 Ala. 582.

⁴ Carey v. Cincinnati, etc., R.R. Co., 5 Iowa, 357.

an organization under a statute of a foreign State, transacted business as a corporation *de facto* under the organization, and that the certificates of shares of stock recited that the corporation was so organized, is sufficient *prima facie* to authorize a finding that the company is duly incorporated, in a case in which the fact is collaterally in issue.¹

§ 338. Admission of incorporation.—When the members, and especially the officers of a company hold themselves out to be a legally incorporated body and act as such with the public, they are estopped in a suit against the company to deny its corporate existence by reason of some defect in the charter.² So, a suit against a corporation by its corporate name admits that it has acquired legal corporate existence, and this fact cannot be overcome by the plaintiff charging in his complaint facts which, if true, go to show that the defendant has not complied with conditions precedent to obtaining the charter.³ After a corporation has been organized and transacted corporate business for a considerable time, it is not competent for a member, in an action against him to enforce the payment of his subscription, to object that the meeting for organization was not duly called.⁴ If a subscriber, knowing that the whole capital stock has not been subscribed, participates in the organization of the corporation, attends its meetings, is one of the directors, and is privy to the contract on which an action is brought against him to enforce his individual liability, he will not be heard to deny the regularity of the organization, or to set up as a defense a partial subscription.⁵ A party by contracting with an association under the name of a corporation recognizes the existence of a legal entity known by that name, and hav-

¹ Barrett v. Mead, 10 Allen, 337.

⁴ Chester Glass Co. v. Dewey, 16

² Callender v. Painesville, etc., R.R. Mass. 94.

⁵ Hager v. Cleveland, 36 Md. 476.

Co., 11 Ohio St. 516.

³ People v. Ravenswood, etc., Co., 20 Barb. 518.

See Anderson v. Newcastle, etc., R.R. Co., 12 Ind. 376.

ing capacity to contract, and the contract is *prima facie* evidence against him, in the nature of an admission on his part, of the right of the person of being represented by that name to enforce the contract by action.¹ It has accordingly been held that a defendant by giving his note to a corporation in its corporate name as payee admits its legal existence and capacity to make and enforce the contract, so far at least as to render proof on that point unnecessary in the opening of its case, and if the defendant does not in his answer deny the legal existence and organization of the corporation he cannot avail himself of the objection in defense; and that, in such a case, it is not necessary for the plaintiff, when a foreign corporation, to prove, as a part of its *prima facie* case, that it has complied with the requirements of the statutes of the State in which it was created, or of the State in which the suit is brought.² In Indiana and Missouri a person contracting with a corporation as such, is estopped by the contract to deny the legal existence of the corporation.³

¹ Johnston Harvester Co. v. Clark, 30 Minn. 308. A foreign corporation obtained judgment in an action against A., and B. entered into a recognition as bail for him. In a suit on the bail bond it was held that B. was estopped by his bond from denying the existence of the corporation. Henriques v. Dutch West India Co., 2 Ld. Raymond, 1532. See Dutchess Cotton Manf. v. Davis, 14 Johns. 238.

² Williams v. Cheney, 3 Gray, 215. See Topping v. Bickford, 4 Allen, 120; Worcester Med. Inst. v. Harding, 11 Cush. 285; Jones v. Bank of Tenn., 8 B. Mon. 122; Woodson v. Gallipolis, 4 Id. 203; West Winsted Savings Bank v. Ford, 27 Conn. 282. Indorsing a bill of exchange to a bank is not an admission that the bank is incorporated. Hargrave v. Bank of Ill., 1 Breese, 84.

³ Jones v. Cincinnati, etc., Co., 14 Ind. 89; Evansville, etc., R.R. Co. v.

Evansville, 15 Ind. 395; Studebaker Bros. Manf. Co. v. Montgomery, 74 Mo. 101. This does not extend to the question of legal power to organize, but only to the *de facto* organization. Hence if an organization was completed when there was no law, or an unconstitutional one, authorizing an organization, the doctrine of estoppel does not apply. Heaston v. Cincinnati, etc., R.R. Co., 16 Ind. 275. Although a person who deals with an association claiming to be a corporation, and in so doing recognizes its corporate existence, cannot escape liability by denying that there is any such corporation; yet when a note given to the agent of a corporation is made to him individually and by him indorsed to the corporation, the latter cannot introduce evidence to show that it was the original owner. Smelser v. Wayne, etc., Turnpike Co., 82 Ind. 417.

In New York and Texas, to work such estoppel it has been necessary that the contract should state that the party contracted with was a corporation.¹ Where a corporation is acting under an amended charter a person who contracts with it in the name authorized by the amendment, cannot deny that the amendment has been legally accepted by the corporation.²

§ 339. Admissions in general.—If an act of the selectmen of a town, and declarations explanatory of it are of such a character as to justify the inference that an agreement has been made by the selectmen as a body, in behalf of the town which by their office they have the power to do, the act and declarations, as a part of the *res gestæ*, will be competent evidence of the agreement, not in the nature of an admission, but as naturally following such an agreement and laying the foundation for an inference that the agreement was made.³ Receipts of the officers of an association in the book of a corporation furnished by it to the plaintiff and proved by its secretary for money paid by the plaintiff to those officers, are admissible against the association, although the receipts embrace other items than those of which they are evidence in the case at bar.⁴ In an action on a note, against the surety, the defendant proved that after the note was due, he sent a messenger to the bank to inquire if the note had been paid, and the cashier of the bank told him it had; that the defendant thereupon released certain property of the maker of the note which he might have held as security; and that the cashier had since

¹ Williams v. Bank of Mich., 7 Wend. 541; Welland Canal Co. v. Hathaway, 8 Id. 481; Bank v. Simonton, 2 Texas, 531; Holloway v. Memphis R.R. Co., 23 Id. 465. Although a defendant be estopped by his entering into a contract with a corporation from calling in question the corporate existence at the time of making the contract, there is not an

admission that there has not been a subsequent dissolution. Vernon Society v. Hills, 6 Cowen, 23.

² Eppes v. Mississippi, etc., R.R. Co., 35 Ala. 33.

³ Glidden v. Unity, 33 N. H. 571.

⁴ North. Am. Building Assoc. v. Sutton, 35 Pa. St. 463.

died, and the maker of the note became insolvent, leaving the note unpaid. It was held that the declaration of the cashier did not bind the bank, it having been made not as a part of the transaction, but long subsequent to it.¹ If a dealer's book accompany a deposit in a bank, and the credit be given when the deposit is made, it becomes an original entry, and will be conclusive on the bank; but if the book is sent afterward to be written up, it is not an original entry and may be inquired into.² A paper signed by the clerk of a corporation is not competent evidence of an agreement binding on the corporation, unless there is proof that it was executed by the authority of the directors.³ The admissions of a railroad engineer in relation to an accident caused by the train he was running, are not admissible against the company.⁴ In a suit against a stockholder personally liable on a judgment obtained against the corporation, if the record discloses a good cause of action, and there has been

¹ Franklin Bank v. Steward, 37 Me. 519, RICE and APPLETON, JJ., dissenting. In an action against a surety of the cashier of a corporation, a letter containing admissions of the cashier written after his term of office had ceased, was held not competent as evidence. Chelmsford Co. v. Demarest, 7 Gray, 1.

² Manhattan Co. v. Lydig, 4 Johns. 377. A corporation which receives payments of instalments on shares is estopped from denying that such stock exists. North Am. Building Assoc. v. Sutton, 35 Pa. St. 463. Where a note in suit is indorsed "without recourse, Joel Scott, Secretary," the authority of Scott to sign for the corporation is admitted, unless it is put in issue by the pleadings. McIntire v. Preston, 5 Gilman, 48.

³ White Mts. R.R. Co. v. Eastman, 34 N. H. 124.

⁴ Robinson v. Fitchburg, etc., R.R. Co., 7 Gray, 1. The declaration of the

president of a railroad company that he thought the company would pay the plaintiff damages, being a mere expression of opinion, would in no way bind the company. Robinson v. Fitchburg, etc., R.R. Co., 7 Gray, 92. Admissions made by a bank president in a conversation respecting past transactions, are not admissible in evidence against the bank in an action based on these transactions. Franklin Bank v. Cooper, 39 Me. 542. In Osgood v. Manhattan Co., 3 Cowen, 612, whether an admission of a member of a corporation aggregate could be received in evidence against the corporation, was regarded as very questionable. Chancellor SANDFORD, being a stockholder in the corporation, gave no opinion. In Mayor, etc., v. Long, 1 Campbell, 22, it was held that in an action by a corporation what a member of the corporation had been heard to say of the corporation could not be admitted as evidence against the corporation.

a default, the defendant cannot object that the evidence did not sustain the declaration.¹

§ 340. Corporate records.—That a corporation has regularly organized, and who are the owners of its capital stock, may be shown by its records.² The records of a corporation, properly verified, are *prima facie*, but not conclusive evidence, as to who were directors at a specified date.³ A certified copy of a paper or plan found in the proper receptacle of the records of a corporation, such certificate having been made by the acting clerk of the corporation, who is shown to be such, is admissible in evidence if the paper or plan relates to the question at issue; and the same rule applies to a copy of the records which purports to recite a vote of the corporation in relation to a material fact.⁴

To render corporate books evidence of the proceedings of the corporation it must appear that they were kept as such, and that the entries were made by the proper officer. Showing that a book is in the handwriting of one who appears from the entries, but in no other way, to have been secretary, is not sufficient.⁵ Corporate books do not prove themselves. Therefore the transfer book of a corporation, without proof *aliunde* of the true character of the book, cannot be introduced in evidence.⁶ In an action against a corporation to enforce a money claim, the plaintiffs rested their case on proof of an entry in a record book of the defendant of a vote of the directors approving the plaintiffs' account, and directing the same to be paid. It was held that, for the purpose of showing that such record book was not authentic, two other books purporting to contain

¹ *Came v. Brigham*, 39 Me. 35.

⁶ *Highland T. Co. v. McKean*, 10

² *Penobscot R.R. Co. v. White*, 41 Johns. 154.

⁶ *Pittsburg Coal Co. v. Foster*, 59 Pa.

Me. 512.

³ *Blake v. Bayley*, 16 Gray, 531.

St. 365; *Haynes v. Brown*, 36 N. H.

⁴ *Whitehouse v. Bickford*, 29 N. H. 545.

(9 Fost.) 471.

records of the proceedings of the directors on the same day, and in which the vote did not appear, were admissible; and that evidence offered by the defendant to show that the defendant repudiated the vote when it became known to the directors, who were not present when it was passed, was also admissible.¹ Although the books of a bank are evidence both for and against the corporation, yet it is competent to prove by parol independent facts, such as the division and distribution of the stock, and the issuing of bills.² The books of a corporation showing the purchase by it of real estate, and the payment therefor in stock duly transferred to the grantor, though not admitted in evidence as corporate books, are competent as a memorandum in writing made by an agent of the parties at their request, and in that view evidence for and against them, and for and against all persons claiming under them.³ The records of the corporation are evidence against a stockholder to show assessments on shares, a proceeding in ordering an assessment being strictly a corporate act operating on all of the shares.⁴ Entries in the books of a corporation relating to

¹ Goodwin v. U. S. Ins. Co., 24 Conn. 591. Books of record of a corporation are competent evidence of the acceptance by the corporation of a line of telegraph according to contract. Brewer v. Stone, 11 Gray, 228.

² Banks v. Darden, 18 Ga. 318. The books of a bank are ordinarily in the possession of the cashier. He holds them as the officer, agent, or servant of the bank, in the same manner that an attorney holds the papers of his client, and they cannot be taken from his custody by a *subpoena duces tecum*. If upon notice by the adverse party the books are not produced, the contents can be proved as in other cases. Utica Bank v. Hilliard, 5 Cowen, 419.

³ New England Manf. Co. v. Van-dyke, 1 Stockton N. J. 498. A corporation executed a lease of land which

contained a power of re-entry for non-payment of rent. Subsequently the corporation executed another lease to another party for the same land. In an action of ejectment brought by the first lessee it was set up in defense that the trustees of the corporation had re-entered for non-payment of rent, the evidence of which was a statement in the books of the trustees that the premises had been re-entered and sold for rent in arrear. The clerk of the trustees who made the memorandum in the books, testified that he did so by direction of the trustees. It was held that the testimony of the clerk was not admissible. Jackson v. Walsh, 3 Johns. 236.

⁴ White Mts. R.R. Co. v. Eastman, 34 N. H. 124.

other matters of fact than corporate proceedings, such as its business transactions, are not admissible in its favor in a controversy between it and a third person ; nor between it and a member of the corporation holding or claiming adversely to it ; nor against a member in relation to his private dealings with the corporation ; nor between him and a stranger ; nor between two strangers.¹ Although the proper and usual evidence that a party is a stockholder is the production by him and proof of his certificate, yet proof of the same fact by a third person must ordinarily be derived from the corporate books. If the absence of these records is sufficiently accounted for, parol evidence is admissible.²

A statute which provides that the stock books of certain corporations "shall be open to the examination of every stockholder for thirty days," gives stockholders a right not only to inspect the books, but to take copies of the names of the stockholders. The officer having the custody of the books is not constituted by the act a judge of the motives of the stockholder in making the inspection, nor of the precise manner in which it shall be conducted, nor of the purpose which the information thus obtained shall be made to subserve.³ In an action by a bank against a depositor for an overdraft claimed to have been made through an error in the depositor's account, the books of the bank in which the account is kept are competent evidence ; for the bank furnishes to its depositors transcripts from its books which in

¹ Haynes v. Brown, 36 N. H. 545 ;
Hager v. Cleveland, 36 Md. 476.

² Haynes v. Brown, *supra*. Where in an action against a corporation for services rendered, brought by a person who claimed to have been appointed by the corporation its agent, the plaintiff did not give the defendant notice to produce the record of its meetings, it was held that parol evidence of the action of the board of trustees in rela-

tion to such appointment was not admissible. Haven v. N. H. Asylum, 13 N. H. 532.

³ Brouwer v. Cothreal, 10 Barb. 216, aff'd 1 Selden (5 N. Y.) 562. A stranger has no more right to inspect the books of a corporation than he has to inspect the books of a private person. Southampton v. Graves, 8 Term Rep. 590.

effect operate as an acknowledgment of the parties in relation to their mutual dealings.¹

§ 341. Presumptive evidence.—Notices of a demand of payment, and of a sale of stock for non-payment, exhibited to the court with the testimony of a person that he examined a file of newspapers and ascertained that such notices were published for the length of time required, are sufficient evidence that the notices were correctly given.² In general, in an action to enforce payment of subscriptions to stock, strict compliance with the provisions of the charter on the part of the corporation must be shown; but in some cases it will be presumed, and in others it may be waived. Payment of instalments on a subscription is a sufficient recognition of the legal existence of the corporation.³ Unless the power to take and assign notes can be inferred as necessary or incident to the purposes for which such a corporation was established, it is necessary to prove it by the charter or otherwise. But if the corporation had authority to take a note for any purpose, a note in the hands of a *bona fide* assignee will be valid, although the corporation may have had no power to take that particular note, and it is not necessary to show that the power has not been taken away. When a corporation has power to take and negotiate a note in the ordinary course of its business, it is incumbent on the defendant to show that the note in suit was not transferred in that way.⁴ A note having been assigned by a foreign corporation by the indorsement thereon of its president, in an action on the note by the assignee, it

¹ Union Bank v. Knapp, 3 Pick. 96. The books of a bank are open for the inspection of depositors, and the bank is bound to produce them for that purpose on all proper occasions; the officers of the bank who have charge of the books being so far regarded as agents of both parties. *Ibid.*

² Grays v. Turnpike Co., 4 Rand. 578.

³ Maltby v. Northwestern Va. R.R.

Co., 16 Md. 422. In an action brought to recover instalments upon a subscription for stock, proof by the plaintiff of the act of incorporation, its acceptance, the opening of books of subscription, the subscription of the defendant, and the calls made for instalments, establish a *prima facie* case. Milford, etc., T. Co. v. Brush, 10 Ohio, 111.

⁴ McIntire v. Preston, 5 Gilman Ill. 48.

was held that proof of the indorsement was sufficient to establish a *prima facie* case.¹ A bond and mortgage were executed by five persons, each of whom affixed his private seal, and there was annexed to the signatures the word "Trustees." In the descriptive part of the mortgage there were added to their names as mortgagors the words, "Trustees of the Methodist Episcopal Church." In the bond accompanying the mortgage, and executed in like manner, they bound themselves and their successors in office, and in the proof of acknowledgment of the execution each of them by his affidavit certified that he was a trustee of the Methodist Episcopal church, that he signed his name to the instrument as such trustee, and affixed his seal thereto by and under the order and resolution of the board of trustees of the corporation. It was held that extrinsic proof of facts to show whether the mortgage was or was not the act of the corporation was admissible.² Where, in an action against B., the cashier of a corporation, and his sureties, no written memorandum of his appointment could be found, it was held that proof of its contents might be given, or, if there was no evidence that there ever was a memorandum, it would be proper to show that B. continually acted as cashier.³ Although in such an action a resolution in the book of minutes that the name of one of the signers of the cashier's bond be struck off, provided the other sureties agreed thereto, would not be competent evidence to show a consent by the defendants to the alteration, yet it would be proof that at that date the directors were in possession of the bond.⁴ Testimony as to the object and purpose of a corporation and one of its shareholders in making a pri-

¹ Topping v. Bickford, 4 Allen, 120.

² Lee v. Meth. Epis. Church, 52 Barb. 116. A deed of land, which purports to have been executed under the authority of a corporation by its president, having been duly recorded, a certified

copy of such record is admissible to establish a chain of title. Chamberlain v. Bradley, 101 Mass. 188.

³ Barrington v. Bank of Washington, 14 Serg. & Rawle, 405.

⁴ Ibid.

vate agreement in relation to the reduction of the number of shares subscribed for by a party to the suit is competent to show the fraudulent character of the transaction as to third persons.¹

¹ White Mts. R.R. Co. v. Eastman, 34 N. H. 124. Instructing the jury that if they find certain facts proved there is sufficient evidence to establish the claim is error, the weight and sufficiency of a fact being exclusively for the jury. Maltby v. Northwestern Va. R.R. Co., 16 Md. 422.

CHAPTER XX.

SALE OF CORPORATE PROPERTY ON EXECUTION.

§ 342. Sale of corporate franchise. 343. Stock in a corporation. 344. Property exempt from seizure and sale. 345. General rule as to liability of corporate property.	§ 346. Rolling stock of railroad com- pany. 347. Process of garnishment. 348. Officer's return. 349. Method and consequences of sale.
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§ 342. Sale of corporate franchise.—The execution or carrying into effect the final judgment of the court has been termed, by some of the older writers, “The fruit and end of the law.” At common law, the franchises of a corporation are not subject to seizure and sale upon execution, but can only be reached by proceedings in equity.¹ A cor-

¹ James v. Pontiac, etc., P. R. Co., 8 Mich. 91; Munroe v. Thomas, 5 Cal. 470; Thomas v. Armstrong, 6 Id. 280; Wood v. Turnpike Co., 24 Id. 474; Stewart v. Jones, 40 Mo. 140; Arthur v. Commercial, etc., Bank, 9 Smedes & Marsh, 394; Baxter v. Nashville, etc., Turnpike Co., 10 Lea Tenn. 488; Youngman v. Elmira & Williamsport R.R. Co., 65 Pa. St. 278; Susquehanna Canal Co. v. Bonham, 9 W. & S. 27; Richardson v. Sibley, 11 Allen, 65; Palestine v. Barnes, 50 Texas, 538. In Gue v. Tide Water Canal Co., 24 How. 257, it was held that a franchise to take tolls on a canal could not be sold on execution, unless authorized by statute, nor property essential to the enjoyment of the franchise; that if a creditor was authorized to compel a sale of the entire property of the corporation, including the franchise, for the payment of his debt, his remedy was in equity

where the rights and priorities of all of the creditors might be considered and protected, and the property of the corporation be disposed of to the best advantage for all concerned. In a still later case, in the same court, the court said: “Much confusion of thought has arisen in this case and similar cases from attaching a vague and undefined meaning to the term franchises. It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that if one of these exists, it is loosely termed a franchise, and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain.” MATHEWS, J., in Chesapeake & Ohio R.R. Co. v. Miller, 114 U. S. 176.

porate franchise does not pass by a sheriff's deed after an execution sale, for the reason that a franchise is a special privilege, and the persons to whom such a privilege is granted hold it as a personal trust. Even if title were acquired to the property of a corporation by such a sale, the purchaser could not claim the franchise as appurtenant, for franchises being principal things, and lying in grant as such, they are appurtenant to nothing. A sheriff's deed under an execution sale of "all the right, title, interest, claim, and property of a turnpike company in and to the turnpike road, a highway," conveys nothing to which an action of ejectment can have any remedial relation; a road, way, or highway, being a mere easement. Such a way is *publici juris*, and all the interest that a turnpike company has in it is by reason of the fact that it has the right to collect tolls on the line of the road as a compensation for the public service it has performed by opening a public road for the benefit of the public.¹ A ferry is a franchise, and is not subject to levy, sale, or delivery, under execution. It involves a personal trust granted by the government upon conditions imposed upon the grantee alone, whose liability cannot be removed by substitution.²

¹ Wood v. Truckee Turnpike Co., 24 Cal. 474. See Hatcher v. Toledo, etc., Co., 62 Ill. 477. The capacity to have perpetual succession in an artificial form, to take and convey property, contract obligations, and sue and be sued as an individual, is inalienable in the hands of the artificial being thus created, which has no power to transfer its own existence into another body, nor to enable natural persons to act in its name except as its agents, or as members of the corporation in conformity with the modes required or permitted by its charter. Although it may be divested of its property, together with the franchise of operating and

deriving benefit from the use of it, its corporate existence survives until the State sees fit to terminate it by a proper proceeding. Atkinson v. Marietta, etc., R.R. Co., 15 Ohio St. 21.

² Munroe v. Thomas, *supra*. Thomas v. Armstrong, 7 Cal. 286, was an application for a mandamus to compel supervisors to renew a ferry license. They had refused the application on the ground that the franchise or privilege had been sold on execution against the petitioner, and that Armstrong, the purchaser, to whom they awarded the license, was subrogated to the rights of the plaintiff. It was held that the sale of the plaintiff's privilege was a nullity.

When a sheriff derives from a special statute authority to seize and sell corporate franchises, he must proceed strictly according to the statute or the sale will be void, notwithstanding the acquiescence of individual stockholders who are under no obligation to direct the sheriff in the discharge of his duties.¹ Even if a purchaser subsequent to such alleged sale should expend large sums in repairs on the property, he would be considered to have made them voluntarily, and it would not cure the invalidity.²

§ 343. Stock in a corporation.—Shares in an incorporated company being merely the evidence of property, the sale of them upon execution is not authorized at common law;³ but in some of the States they have been thus subjected by statute.⁴ If certificates of the shares were given to the

¹ Seymour v. Milford, etc., T. Co., 10 Ohio, 476; Randolph v. Larned, 27 N. J. Eq. 557.

² James v. Pontiac, etc., P. R. Co., 8 Mich. 91. The property, rights, and franchises of a railroad company having been sold under a deed of trust, the purchasers consolidated with other companies. Subsequent to the consolidation, the legislature enacted that in the event of the consolidation of two or more companies, the consolidated company should be liable for all debts of each company that entered into the arrangement. It was held that the act was designed to apply to companies which might effect a consolidation after its passage; and that the road and all the property of the company which were transferred to the purchasers, under the trust deed were released from any liability for the payment of debts which were not a prior lien. Hatcher v. Toledo, etc., R.R. Co., 62 Ill. 477.

³ Denton v. Livingston, 9 Johns. 96; Cooper v. Canal Co., 2 Murphey N. C. 195; Nashville Bank v. Ragsdale, Peck

Tenn. 296; Denny v. Hamilton, 16 Mass. 402; Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373; Arnold v. Ruggles, 1 R. I. 165; Ross v. Ross, 25 Ga. 297; Foster v. Potter, 37 Mo. 525; Johns v. Johns, 1 Ohio St. 350; Blair v. Compton, 33 Mich. 414; Van Norman v. Jackson County Circuit Judge, 45 Id. 204; Nabring v. Bank of Mobile, 58 Ala. 204; Goss v. Phillips, 4 Ill. App. 510; Merchants' Mut. Ins. Co. v. Brower, 38 Texas, 230; Barnes v. Hall, 55 Vt. 420.

⁴ In Massachusetts, the revised statutes, ch. 90, sec. 36, provide that shares in a joint stock company which is incorporated, may be attached and held as security to satisfy the final judgment; and the Code of Iowa, secs. 2967, 3050, contains special provisions in relation to the attachment of stock in a corporation. See Graw v. Memphis, etc., R.R. Co., 5 Coldw. Tenn. 434; North Cent. R.R. Co. v. Rider, 45 Md. 24; Toledo, etc., R.R. Co. v. Reynolds, 72 Ill. 487; O'Brien v. Mechanics', etc., Ins. Co., 56 N. Y. 52; Barnes v. Morgan, 3 Hun, 703; Curtis

purchaser, the case would be analogous to the sale of a chattel; for the delivery of the certificate would be like the delivery of the chattel, and the transfer might be considered complete. But in that case, unless by the return of the officer upon the execution it appeared that the requirements of the law had been complied with, the corporation might not be justified in giving certificates to the purchaser.¹ The fundamental condition of attachment proceedings that the subject of them must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence of its officers, or by the fact that the corporation has property and is transacting business here. A foreign corporation is not here because its agents are here, nor because it has property here; nor is the stock here because the corporation has property or is conducting its business in the State. Shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the State or country of its creation. In all other places it is an alien. It may send its agents abroad, or transact business abroad, but such agents do not represent the corporation in respect to rights incident to the ownership of shares.²

v. Steever, 36 N. J. 304; Chesapeake, etc., R.R. Co., 22 Gratt. 502; Stamford Bank v. Ferris, 17 Conn. 259.

¹ Howe v. Starkweather, 17 Mass. 240; Princeton Bank v. Crozer, 22 N. J. 383; Lippett v. Am. Wood Paper Co., 14 R. I. 301.

² Plimpton v. Bigelow, 93 N. Y. 592. A company having been incorporated in Alabama, an act of Kentucky provided that all privileges and immunities were conferred upon it in the latter State which had been granted to it in

the former. It was held that its property could not be attached in Kentucky as that of a foreign corporation, and that such of it as had been previously mortgaged to pay certain outstanding debts could not be appropriated by attachment to the payment of second mortgage bonds without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal title-holders into court. Martin v. Mobile, etc., R.R. Co., 7 Bush. Ky. 116.

§ 344. Property exempt from seizure and sale.—It has been held that the facilities afforded the public by a public corporation ought not to be disturbed by the seizure by creditors of any portion of the corporate property which is essential to its active operations.¹ Where land is dedicated by the legislature to a municipal corporation for a specific public use, such as a market-place, the corporation is a mere trustee in respect to such land, which cannot be made subject to the payment of corporate debts, and a sheriff's sale of the same on execution is a nullity.² But real estate in which the interest of a city is absolute, qualified by no conditions and subject to no specific uses, is a leviable interest subject to sale under execution, and such interest in the premises passes to the purchaser.³ Although if the State becomes interested as a stockholder in a corporation, such

¹ Foster v. Fowler, 60 Pa. St. 27. Where an incorporated water company refuses to pay taxes, it should not be so dealt with as to deprive the public of water. Louisville Water Co. v. Hamilton, 81 Ky. 517. The real estate acquired under the exercise of the right of eminent domain cannot be sold under execution. Gooch v. McGee, 83 N. C. 59. See Worcester v. Norwich, etc., R.R. Co., 109 Mass. 103. When the business of a corporation is general storage, including the right to issue warehouse receipts, the real estate of the corporation used in the exercise of its franchise is not exempt from mechanics' liens. Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. St. 248. See Plymouth P. R. Co. v. Colwell, 39 Pa. St. 337; Youngman v. Elmira & Williamsport R.R. Co., 65 Id. 278; Mahoney v. Spring Valley Water Co., 52 Cal. 159; Am. Dock, etc., Co. v. Trustees, 39 N. J. Eq. 410.

² President, etc., v. Indianapolis, 12 Ind. 620. Public buildings in a city which are necessary for the adminis-

tration of the municipal government, and are devoted to that purpose, are exempt from State taxation; but it is otherwise as to property which is owned and used by a city for its own profit as a social or commercial community—such as vacant lots, market-houses, fire-engines, and the like. Exemption from taxation has been extended to property of a city dedicated to charity. Louisville v. Com., 1 Duvall Ky. 295.

³ Holladay v. Frisbie, 15 Cal. 630. There was a proviso in a legislative grant of certain property to a city by which the city was to pay the State twenty-five per cent. of the proceeds of the sale of the property. The sheriff having sold the right, title, and interest of the city, it was held that the latter was estopped from setting up any right in the State; that when the State chose to assert its right in the premises, it would be time enough for the court to determine the character of the title which the plaintiff acquired. Ibid. See Smith v. Morse, 2 Cal. 524.

interest will not protect the corporation from a suit nor its property from levy and sale, yet the State may lend its aid to a corporation under such circumstances that its interest in the corporate body will not be subject to the ordinary process of execution. If, for instance, it is clear from the provisions of the law under which the State has advanced money on turnpike stock, that the directors of the company cannot appropriate the tolls to the payment of its debts in such manner as to prevent the State from receiving its dividends, the right of the company to take toll cannot, through the instrumentality of a prior general statute, be made subject to execution whereby the State may, and in all probability will be deprived, not only of its dividends, but of the receipt of anything in return for the money invested in the company.¹

Land held for railroad purposes cannot be sold under execution in favor of a creditor of the company. For as the corporation is established by law, and, in legal contemplation, exists for the public benefit, it can only be put out of existence, or stripped of what is essential to its existence, by public authority, and not by private suitors.² A railroad is a public highway with certain incidental private interests, and neither the company nor a purchaser of the materials which have become a part of the road can lawfully tear up the track while the road is in the possession of and used by the company.³ Rails and chairs which have been imbedded in the track, but have been taken up to be re-rolled and re-laid, are fixtures, and as a part of the realty, are not subject to severance therefrom by a levy and sale on execution; and the same is the case, on the ground of public policy, with reference to deposits of rails and

¹ Seymour v. Milford, etc., Turnp. Co., 10 Ohio, 476.

at an execution sale, subject to the servitude of the company's right as a railroad company.

² Oakland R.R. Co. v. Keenan, 56 Pa. St. 198. But land to which a rail-

road company has title may be bought

³ State v. Rives, 5 Ired. 297.

chairs maintained at convenient distances to be used for immediate repair.¹ A railroad company executed to trustees a mortgage of its whole road and all of its corporate rights, franchises, and privileges, and subsequently took possession of land by right of eminent domain. The mortgage having been foreclosed, it was held, in a suit by the owner of the land against a new company, which was the assignee of the purchaser at the mortgage sale, that the latter company had no interest in or claim to the land taken as above upon which the mortgage could have operated, and that the sale under it neither conveyed the subsequently acquired title, nor extinguished the lien if any obtained for the damages. An interest acquired by a railroad company in land appropriated for the use of its road, when it is a mere easement or right of passage for a public purpose, is not the subject of a sale under execution.² Hence, though the mortgage sale operate as an extinguishment of subsequent liens on the property sold, yet the judgment of the owner of the land taken for his damages is not a lien in the ordinary sense, and his claim is not liable to be divested by such sale. The judgment obtained in behalf of the landowner not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payment, it can only be extinguished by payment or release, and when the alienees of the mortgaging company come into possession under their purchase,

¹ *Corry v. Pittsburg, etc., R.R. Co.*, 3 Phila. 173. Subsequent to the execution of a mortgage by a railroad company of all of its property, creditors recovered judgments against the company before justices of the peace, upon which executions were issued to a constable, who levied on a tank-house of the company which had been erected after the execution of the mortgage, and advertised it for sale. It was held that the tank-house was a part of the realty,

and that as the authority of the officer was only to seize and sell goods and chattels, his attempt to sell permanent fixtures was in excess of his authority, and he might be restrained by injunction. *Titus v. Ginheimer*, 27 Ill. 462. See *Titus v. Mabee*, 25 Id. 257.

² But see *Evangelical, etc., Home v. Buffalo Hydraulic Assoc.*, 4 Hun, 419; 64 N. Y. 561; *Presbyterian Soc. v. Auburn Co.*, 3 Hill, 567.

they take the interest, acquired *cum onere*, and the land-owner is entitled to execution on his judgment.¹

As a turnpike company is incorporated for a special purpose in which the public is interested, it has no interest in real estate, legal or equitable, which is subject to execution, unless it has a right to land or other property not on the road. An execution, therefore, levied in part on the road and in part on land contiguous to it, will be quashed unless the parts can be separated.²

A seat in a board of brokers being a mere personal privilege, or, more properly speaking, a license to buy and sell at the meetings of the board, it is not subject to levy and sale on execution in any form.³

§ 345. General rule as to liability of corporate property.—The tangible property of a corporation is no more exempt from execution than that of an individual;⁴ and a *bona fide* assignment of its property by an insolvent corporation to a trustee for the benefit of its creditors, is a valid sale and transfer of the property for a valuable consideration equally with that of a private person, a corporation being bound to provide for its just debts, whether the payment is made by sale of property for that purpose, or with money from its vaults.⁵ Money deposited in a bank by a corporation in a separate account from the corporation's general account, and for a specific purpose, is liable to execution if

¹ Western Pa. R.R. Co. v. Johnston, 59 Pa. St. 290.

² Ammant v. New Alexandria Turnp. R. Co., 13 Serg. & Rawle, 210.

³ Pancoast v. Gowan, 93 Pa. St. 66.

⁴ Slee v. Bloom, 19 Johns. 475; State v. Rives, 5 Ired. 297; Perry v. Adams, 3 Metc. 51; Goodrich v. Burbank, 12 Allen, 459. A creditor of a turnpike company obtained judgment against the company, and caused execution to be levied on personal property of the company purchased with

the profits of the road. It was held that as the property levied on did not consist of the works of the company, nor of materials for the construction of the road, satisfaction of the execution could not be successfully resisted. Franklin, etc., Turnp. Co. v. Young, 8 Humph. 103.

⁵ State Bank v. Maryland, 6 Gill & Johns. 205; Holmes v. Nuncaster, 12 Johns. 395; Seymour v. Dascomb, 12 Wend. 584; Spencer v. Blaisdell, 4 N. H. 198.

the deposit can be drawn out by the corporation on its own check, and is entirely at its own disposal so far as the bank is concerned.¹ In England, where, after a judgment at law against a corporation, a rule for a mandamus was obtained against the corporation, commanding it to pay the amount of the judgment, and to make calls on the stock-holders for that purpose, the court, in discharging the rule, remarked that the judgment against the corporation was an answer to the application, because the plaintiff had the ordinary legal remedy of an execution.²

A member of a corporation may acquire a lien for his private debt against the corporation, and attach and sell the corporate property on an execution, the same as any other creditor, and without being postponed to a subsequent attaching creditor, even though by statute members are made personally liable for the corporate debts. If a creditor elect so to do, he may levy on the personal property of the

¹ Farmers', etc., Bank v. Ryan, 64 Pa. St. 236. Money having been deposited by a corporation with a banker, a sheriff wishing to levy on the amount on an execution against the corporation, the banker voluntarily, and without authority from the corporation, counted out the amount, and put the same in a package by itself, and the sheriff made a levy on it, and afterward sold the same on the execution. Subsequently, the corporation assigned all its right to the money to the plaintiff. It was held that the money thus separated by the banker from the contents of his vault was his property, and not that of the corporation; that it was not subject to levy under an execution against the corporation; and that the plaintiff was entitled to recover from the banker the amount of the deposit. Carroll v. Cone, 40 Barb. 220.

² Reg. v. Victoria Park, 1 Q. B. 289. In Wisconsin, judgment was recovered

against a city, and an execution issued thereon, which was returned *nulla bona*. Payment was demanded of the city treasurer, who refused to pay the same or any part of it. A rule was granted to show cause why a peremptory mandamus should not issue commanding the common council to levy, assess, and collect a tax to pay the judgment. State v. Milwaukee, 20 Wis. 87. In Pennsylvania, a petition was granted for a mandamus to compel a county to levy and collect a tax for the purpose of paying the interest due and accruing on bonds issued to pay a subscription of the county to railroad stock. Com. v. Perkins, 43 Pa. St. 400. In North Carolina, when a judgment is obtained against a county, the plaintiff is not entitled to execution, but must apply for a mandamus against the board of county commissioners to compel them to levy a tax for the satisfaction of the judgment. Gooch v. Gregory, 65 N. C. 142.

member, in which case the latter will have a claim for contribution upon the other members. But if a member who was a prior attaching creditor were postponed, he would lose his security for his claim, and be deprived of his right to look to his associates for contribution.¹ In New York, although a railroad director, who is plaintiff in a judgment against the company, may sell on execution the personal property of the company which is liable to sale, yet, if he purchase at the execution sale he is a *quasi* trustee of the company, which has an equitable right to redeem the property so sold, and this right extends to mortgagees in a mortgage that has not been filed as a chattel mortgage.² Such land and the buildings thereon as a railroad company holds under its charter in fee simple, are subjects of assignment, or of sale on execution.³

When a railroad company transfers all of its property, real and personal, and also all of the surplus profits of the railroad, to assignees to be managed by them until the corporate debts are paid, but no provision is made for a sale of the property by the assignees, an injunction will not be

¹ Pierce v. Partridge, 3 Metc. 44.

² Hoyle v. Plattsburgh, etc., R.R. Co., 54 N. Y. 314. Personal property acquired by a railroad company, subsequently to its giving a chattel mortgage or deed of trust, cannot be held subject to its provisions, but is liable to levy and sale in behalf of a judgment creditor. The chattels must have an existence at the time of making such an instrument, or any attempt to embrace them in its provisions will be fraudulent against creditors and purchasers, unless such mortgaged property after it is acquired is reduced to the actual possession of the mortgagee. Titus v. Mabee, 25 Ill. 257. If a railroad company purchase land which it is not authorized by its charter to hold,

and then executes a mortgage on all of its property, such land is covered by the mortgage as against a subsequent judgment creditor of the company, although the purchase of it by the company was *ultra vires*. Youngman v. Elmira, etc., R.R. Co., 65 Pa. St. 278.

³ Ammant v. New Alexandria Turnp. Co., 13 Serg. & Rawle, 210; Bushell v. Com. Ins. Co., 15 Id. 173; Youngman v. Elmira, etc., R.R. Co., *supra*. When a railroad corporation has an estate in the land which it has taken by right of eminent domain, and not a mere easement, such estate is liable to execution, and the purchaser will obtain a good title if the sale is duly made. State v. Rives, 5 Iredell, 297.

granted to them restraining a sale of the property under an execution in favor of a judgment creditor.¹

§ 346. Rolling stock of railroad company.—The question whether rolling stock is to be regarded as personal property, or as real estate, has been decided differently in several of the States, and in some of them has been determined by statute. The Supreme Court of New York at first held that, as between mortgagees and judgment creditors, the rolling stock of a railroad company was included as fixtures in a conveyance of real estate.² Afterward the same court decided that a mortgage by a railroad company which conveyed the railroad constructed and to be constructed, with the appurtenances, and all of the real estate and chattels real acquired and then owned by the company, together with its franchises, conveyed no more than would have been done under a description of the roadway and other land of the company by metes and bounds with the appurtenances ; and that the rolling stock, materials, rails, ties, and other things on hand for running or repairing the road, including all of the loose tools and implements, might be seized by the sheriff and sold under an execution in favor of a judgment creditor.³ It has been held in New Hampshire that the rolling stock of a railroad is not so connected with the franchise of the company that it cannot be severed by an attachment or seizure on execution, and held as security, or sold and applied as personal property ordinarily may be for the payment of the corporate debts. The court said : “ Considering that it is not necessary for the discharge of the pub-

¹ Arthur v. Commercial, etc., Bank,
9 Smedes & Marsh, 394.

² Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484.

³ Beardsley v. Ontario Bank, 31 Barb. 619; Bement v. Plattsburgh, etc., R.R. Co., 47 Id. 104. In New York until the statute of 1868, a mortgage by a rail-

road company of its personal property in which was included its rolling stock, was void as against subsequent judgment creditors, and might be sold under an execution in their favor, unless filed as a chattel mortgage in conformity with the statute. Hoyle v. Plattsburgh, etc., R.R. Co., 54 N. Y. 314.

lic duties of these corporations that they should be owners of cars or engines,—many such roads being operated with the cars of other corporations; that it is a matter of great uncertainty what articles of the personal property of such corporations are necessary for the discharge of their public duties; that no means exist by which it can be determined what is necessary or otherwise; that it must be very difficult for courts to lay down any definite rule by which officers can be guided, who in such cases must decide at their peril,—it seems to be neither judicious nor expedient to establish an exemption of this kind, unless it is done by the direct action of the legislature, which can provide proper rules and safeguards for the safety of officers as well as of parties.”¹ In Illinois the constitution provides that rolling stock shall be considered personal property.² In Wisconsin the rolling stock owned by a railroad company, and used in connection with its road, is made a fixture by statute.³

§ 347. Process of garnishment.—With regard to being summoned as garnishee, there is no difference between natural persons and corporations.⁴ When a corporation is duly

¹ Boston, etc., R.R. Co. v. Gilmore, 37 N. H. 410. See Denmead v. Bank of Baltimore, 9 Md. 179; Strickland v. Parker, 54 Me. 263; Howe v. Freeman, 14 Gray, 566. It was remarked by the Supreme Court of Ohio that a distinction could be clearly drawn between an interest in real estate held for the sole purpose of exercising a franchise, and the franchise connected with it, which could not be alienated by the corporation, and was not subject to execution, and the movable things employed in the use of the franchise which are personal property of the company, and liable for the payment of its debts. Coe v. Columbus, etc., R.R. Co., 10 Ohio St. 372.

² Const. Ill., art. 11, sec. 10. But see Hunt v. Bullock, 23 Ill. 320; Palmer v. Forbes, Ib. 302; Titus v. Mabee, 25 Id. 257; Titus v. Ginheimer, 27 Id. 462.

³ Chicago & Northwestern R.R. Co. v. Borough of Fort Edward, 21 Wis. 44. Another statute of Wisconsin makes judgments liens on real estate, and consequently a judgment obtained against a railroad company becomes, from the time of its rendition, a lien on the road, and a sale under a decree in equity, confirmed by the court, passes the whole of the interest of the company to the purchaser. Railroad Co. v. James, 6 Wall. 750. See Covey v. Pittsburg, etc., R.R. Co., 3 Phila. 173; West Pa. R.R. Co. v. Johnston, 59 Pa. St. 290; Applegate v. Ernest, 3 Bush. Ky. 649; Wood v. Turnpike Co., 24 Cal. 478; Miller v. Rutland, etc., R.R. Co., 36 Vt. 452.

⁴ Toledo, etc., R.R. Co. v. Reynolds, 72 Ill. 487; Hughes v. Oregonian R.R. Co., 11 Oregon, 158; Meints v. East St.

brought into court by a writ of attachment as garnishee, and default taken, its property is subject to sale on execution the same as would be that of an individual; and irregularity in the entering of the judgment of condemnation will not justify the interference of a court of equity by injunction.¹ Where there is a balance of a subscription in money to stock of a corporation, the relation between the corporation and the subscriber is merely that of creditor and debtor. Being an ordinary debt it is attachable as other debts are. If there be a lien on the stock, or a liability of the stock to others, which may be a defense, the subscriber must set it up, otherwise his subscription, having the character of an ordinary contract creating a debt, is attachable.² When a corporation is a judgment debtor, an officer of it who has corporate funds or property in his hands may be lawfully proceeded against as a garnishee.³ A judgment was obtained against a bank, execution issued thereon, and proceedings commenced to reach property in the hands of one H. H. appeared, but, by advice of counsel, refused to answer on the ground that he was president of the bank. The court said: "The objection that as H. is president of the bank, and holds in that capacity whatever funds of the bank he has, he is not liable to this examination, it being in effect not a proceeding against him, but against the bank, is fully met. There can be no doubt that the property of a private corporation is liable for its debts whether such property is found in the hands of its president or of any other person. For the purpose of this proceeding H. is regarded as an indi-

Louis Co-operative, etc., Co., 89 Ill. 48; 29 Gratt. 502; Mooar v. Walker, 46 Iowa, 164; *In re* Glen Iron Works, 20 Fed. Rep. 674. See Hays v. Lycoming Fire Ins. Co., 98 Pa. St. 184; Bunn's Appeal, 105 Id. 49; Simpson v. Reynolds, 71 Mo. 594; McKelvey v. Crockett, 18 Nevada, 238.

¹ Boyd v. Chesapeake & Ohio Canal Co., 17 Md. 195.

² Peterson v. Sinclair, 83 Pa. St. 250. See Ross v. Ross, 25 Ga. 297.

³ Everdell v. Sheboygan, etc., R.R. Co., 41 Wis. 395. See Pettingill v. Androscoggin, etc., R.R. Co., 51 Me. 370.

vidual having in his hands property of the bank liable in law for the satisfaction of its debts, and the fact that he happens at the same time to be its president, constitutes no excuse whatever for his refusal to surrender such property, or to answer questions properly propounded to him concerning it.”¹

§ 348. Officer's return.—The return should be sufficiently full and clear to convey a correct idea of the officer's doings in the premises. Describing the property levied on as twenty shares of the capital stock of a corporation named, “being the property of the debtor in the execution,” is good.² But a sheriff having made the following return, “Sale under execution of the interest of Thomas in and to said ferry and the appurtenances belonging,” it was held that the term appurtenances thus used was too general,

¹ *Balston Spa Bank v. Marine Bank*, 18 Wis. 490. M. had judgment and execution against a railroad company, and caused a garnishee notice to be served on the treasurer of the company, who answered that he was treasurer, and that there were moneys in the treasury at the time of the service of the notice, but that he did not at any time individually have control or possession of the funds or effects of the company. The court said: “The servant who feeds, waters, and curries the master's horse, and keeps the key of the stable, the master having the actual and dominant possession and control; a clerk who opens and shuts the store and sells the goods, and has charge of the keys of the money-drawer and safe, subordinate to the actual possession and control of the merchant; the treasurer of the corporation who has charge of the safe and the moneys therein, and receives and pays out under the immediate direction and control of the principal corporate officers, are not to be deemed in such possession and control of the properties as subjects them to garnishment. In such, and like cases, the question is, whether the actual and substantial possession is with the employé, or whether his relation to the properties is merely of employment and service, while the real possession and control is with the owner or some other.” *McGraw v. Memphis, etc., R.R. Co.*, 5 *Coldw. Tenn.* 434. Proceedings in garnishment are not applicable to a municipal corporation. *Baltimore v. Root*, 8 Md. 95; *Ward v. Hartford*, 12 *Conn.* 404; *Merwin v. Chicago*, 45 Ill. 113; *Erie v. Knapp*, 29 Pa. St. 173; *Wilson v. Lewis*, 10 R. I. 285; *Merrill v. Campbell*, 49 Wis. 535; 35 Am. R. 785; *Hadley v. Peabody*, 13 Gray, 200; *Jenks v. Osceola Township*, 45 Iowa, 554; *Wallace v. Sawyer*, 54 Ind. 501; 23 Am. R. 661; *Memphis v. Laski*, 9 *Heisk. Tenn.* 511; 24 Am. R. 327; *Triebel v. Colburn*, 64 Ill. 376. See, however, *State v. Horton*, 38 N. J. 88. 259.

² *Stamford Bank v. Ferris*, 17 Conn.

vague, and indefinite, to comprehend in its meaning any personal property as the subject of the levy, and that therefore nothing passed by the sale.¹ A sheriff's return to a writ of attachment was as follows: "Laid in the hands of the Northern Central Railroad Company; service admitted by counsel; and summoned company as garnishee." It was held that as the law designated the character of the agents on whom process should be served in order to bind the corporation, it ought to appear affirmatively by the return upon what person or persons the writ was served, in order that the court might determine whether the service was on the company.²

§ 349. Method and consequences of sale.—Where there is a general statute directing the mode of attaching and selling by execution shares of debtors in incorporated companies, and a company is subsequently incorporated by a special statute which provides that the property of any member vested in the stock shall be liable to attachment, and to the payment and satisfaction of his just debts in a manner differing from that directed in the general statute, the special statute must be followed in cases involving the stock of the company.³ When a railroad which extends through different counties has become insolvent, a court of equity will interpose and administer the assets, directing a sale of the entire interest for the benefit of all concerned, so as to prevent judgment creditors from seizing and selling separate portions of the property at different sales in the several counties through which the road passes; for if the latter course were permitted a valuable property would be sacrificed, and the objects of the legislature in granting the charter be defeated. In such case a person claiming to be a creditor who has refused to present his demand, and sub-

¹ Munroe v. Thomas, 5 Cal. 470.

³ Titcomb v. Union Ins. Co., 8 Mass.

² Northern Cent. R.R. Co. v. Rider, 326.

45 Md. 24.

mit himself to the jurisdiction of the court for the settlement and adjustment of his claim upon the fund to be distributed, cannot successfully ask the court to set aside its decree and annul the title to the property sold, in order that he may be paid.¹ If the owners of adjoining tracts of land unite in constructing a railroad over such land, by a levy on and sale of one of the tracts, the railroad and appendages pass as real estate, and the parties who so levy become tenants in common in the railroad with the other owners.²

¹ Macon, etc., R.R. Co. v. Parker, 9 Ga. 377. See Denmead v. Bank of Baltimore, 9 Md. 179.

² Strickland v. Parker, 54 Me. 263. In a suit against a corporation for not transferring to the purchaser shares of stock bought at a sheriff's sale on execution under a statute allowing

a delay after the levy before sale of four days, it was held that a delay of thirty days was fatal to the purchaser's title, a new notice being requisite to legalize the sale after the expiration of the four days without one. Titcomb v. Union, etc., Ins. Co., 8 Mass. 326.

CHAPTER XXI.

VISITORIAL POWER.

§ 350. Meaning and object of visita-	tion.	§ 352. Appointment of visitor.
351. Who to be visitor.		353. Power of visitor. 354. Right of appeal.

§ 350. **Meaning and object of visitation.**—In order to maintain the peace and good government of ecclesiastical and eleemosynary corporations, and to secure their adherence to the purposes of their institution, proper persons are provided by law to visit and inspect the conduct of their internal affairs, correct irregularities, and settle disputes arising within them.¹ The visitorial power in England was well known to the law as early as the beginning of the reign of Edward the Third.² In this country, it has no application to religious institutions.³ No authority exists in the government to control a corporation or its funds except where the corporation is public, that is, where its interests and franchises are the exclusive property of the government, notwithstanding the funds may have been generally derived from the bounty of the government. Visitorial

¹ Kyd on Corp. 174; 2 Blk. Com. 480; Binney's Case, 2 Bland Ch. 99.

² Year Books, 8 Edw. 3, fol. 69, 70.

³ Robertson v. Bullions, 11 N. Y. 243; People v. Church of the Atonement, 48 Barb. 603; Watkins v. Wilcox, 4 Hun, 220. The cases in the English courts relative to the visitation of ecclesiastical corporations, cannot

be relied upon here as authorities for the jurisdiction or safely followed as precedents, for the reason that there is no analogy between our system and the laws under which religious societies are incorporated and their temporal affairs managed, and the charities and trusts for religious purposes in England in respect to which the English decisions have been rendered.

power is an hereditament, founded in property, and valuable in the intendment of the law. When it is vested in trustees, there can be no motion of them from their corporate capacity, and no disturbance or interference with the just exercise of their authority, unless it is reserved by the statutes of the foundation or charter. Still, as managers of the revenues of the charity, they are not beyond control, but are subject to the general superintendence of a court of equity for any abuse of their trust in the management of it.¹ The State has visitorial authority to interfere to ascertain whether or not the course pursued by a civil corporation is in excess of corporate power. This authority is asserted through the instrumentality of the courts, and if it is found that a corporation is exercising franchises and functions not granted to it, the court may oust it from such exercise.² The proper method of relief from official acts of officers of State institutions, is by application to the legislature.³

§ 351. Who to be visitor.—The founder or his heirs is the visitor unless he has conferred the right of visitation upon some other person or body. To him belongs the power and duty to inspect the affairs of the corporation, and superintend its officers, according to such regulations and restrictions as he may have prescribed.⁴ Although the founder of an eleemosynary institution and his heirs as such are entitled to the visitorial power in the exercise of which the institution may be regulated and controlled, yet, when by the terms of the donation the founder has surrendered

¹ Allen v. McKean, 1 Sumner, 276.

² Com. v. Del. Canal Co., 43 Pa. St. 295.

³ Weary v. State University, 42 Iowa, 335; Amherst Academy v. Cowles, 6 Pick. 427.

⁴ Murdock's Appeal, 7 Pick. 303. One seized in fee of certain land granted a rent charge thereon for a charity

toward the support of poor old men, and afterward the founder of the charity granted the land so charged to J. S. and his heirs and then died. It was held that the heirs of the founder had the nomination of poor to be partakers of the charity, and not the grantee of the land or his heirs. Atty. Genl. v. Rigby, 3 P. Wms. 145.

the power, and the same is invested by the charter in the trustees of the institution, they, as assignees, and standing in the place of the founder, may exercise visitorial power without being subject to interference so far as respects the government and discipline of the institution, provided they act in good faith and within the prescribed limits of the charter.¹

Eleemosynary corporations are the creatures of their founders. The founder may delegate his power either generally or specially. If he makes a general visitor, the person so constituted has all incidental power, but may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose and no further. He may make a general visitor and yet appoint an inferior particular power to be executed without going to the visitor in the first instance.² When the State is the founder of a college it is entitled to the visitorial power over the college; and when it has delegated that power to certain trustees and overseers in perpetual succession as its chosen substituted agents and visitors, it has a right and interest in having that power perpetually exercised by the bodies which it has constituted for this purpose. The founder is entitled to have the statutes of his foundation as to the powers of the trustees strictly adhered to except so far as he has consented to an alteration of them. Authority to change or modify those powers cannot be construed an authority to take them away and confer them on other persons.³

In this country, the visitorial power over schools and colleges, together with all other powers and rights belonging to them, is usually vested in boards of curators or trustees established by the charter creating the corporation, which

¹ Chambers v. Baptist Education Soc.,
1 B. Monr. 215.

² St. John's College v. Todington, 1
Burr. 158, per Lord MANSFIELD.

³ Ibid.; Allen v. McKean, *supra*.

must be governed by the provisions of the charter as embodying the statutes of the founder. The power of these boards is great, but by no means absolute. They are the creatures of the charter, or rather of the will of the founder as embodied in the charter, and must pursue the path marked out by it.¹ A court of equity has no visitorial power over corporations except such as may be expressly conferred on it by statute.² In case of a clear and distinct trust, the court administers and enforces it as much when there is a visitor as when there is none.³ When there are

¹ State v. Adams, 44 Mo. 570. Colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor and sick considered and treated as private eleemosynary corporations, irrespective of the extent of the property or funds thus acquired. University of Md. v. Williams, 9 Gill & Johns. 365.

² Latimer v. Eddy, 46 Barb. 61; Harper v. Straw, 14 B. Mon. 48; Auburn v. Strong, Hopkins Ch. 317. In Atty. Genl. v. Utica Ins. Co., 2 Johns. Ch. 371, Chancellor KENT said: "I much doubt whether the visitatorial power exists at all and in any case in this court in the English sense of that power as emanating from the royal prerogative and founded on discretion. I should rather conclude that, under the constitutional administration of justice in this State, all corporations, of whatever name or description, were amenable to the supreme court, and to that court only, according to the course of the common law, for the nonuser or misuser of their franchises." A court of equity has power to prevent a diversion of the temporalities of a church from the purposes to which they were devoted, and to compel the due execution of a trust by the officers of a re-

ligious corporation; but not to remove the officers for an alleged diversion of the trust property and consequent abuse of the trust. The office and officer are distinct from the trust and trustee, the latter being subject to the direction of a court of equity, the former not. Robertson v. Bullions, 11 N. Y. 243. In People v. Sailors' Snug Harbor, 54 Barb. 532, it was held that the by-laws regulating the conduct of the inmates of the institution, as adopted by the trustees, were reasonable, and that the relator had been expelled by direction of the trustees, or of the executive committee, after he had notice to attend the investigation of his case, which he failed to do. The court was not willing to concede that the action of the trustees, or of the executive committee, in investigating such a charge, was beyond the review or control of the court. In Georgia, the same visitorial power of correcting the misbehavior of civil corporations and deciding their controversies, is vested in the superior courts of the counties where they are located, which in England belongs to the King's Bench. State v. Georgia Medical Soc., 38 Ga. 608.

³ Atty. Genl. v. Master, etc., of St. Cross, 21 Eng. L. & Eq. 378; Atty. Genl. v. Governors of Foundling Hospital, 2 Ves. Jr. 42.

trustees in virtue of an express trust under a will, they are within the superintending power of a court of equity, not as of itself possessing a visitorial power or a right to control the charity, but as having a general jurisdiction of all abuses of trusts.¹

§ 352. Appointment of visitors.—No technical precise words are necessary for the appointment of either a general or special visitor, but it may be done by any words showing such an intention. “Let him be visitor,” was held a sufficient appointment.² A person may, however, be a general or special visitor without such an express appointment. It must be collected from the whole purview of the statutes considered together, what power the founder meant to confer.³ When such a general control, superintendence, and management of the corporation is given as to constitute the visitorial power, and especially when those thus intrusted with the management and control are not themselves the ultimate beneficiaries, the power of visitors is in them, and does not vest by implication in the donor or his heirs.⁴ When, in the endowment of an institution, governors are appointed, in whom is vested the title to the property, and who are intrusted with the rents and profits, but with no express words appointing them visitors, the word governors does not of itself imply that they are visitors, and they do not remain exempt from being visited.⁵

§ 353. Power of visitor.—There is a great difference between the powers of trustees of an eleemosynary corporation and those of a private moneyed corporation. The latter is composed of shareholders who are members of the corporate body, making the by-laws and all lawful regulations,

¹ Sanderson v. White, 18 Pick. 328; ² St. John's College v. Todington, 1 Atty. Genl. v. Garrison, 101 Mass. Burr, 158.

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² Rex v. Bishop of Ely, 1 Wm. Blk. 71; Atty. Genl. v. Talbot, 3 Atk. 662.

⁴ Sanderson v. White, *supra*.

⁵ Eden v. Foster, 2 P. Wms. 325. See Atty. Genl. v. Middleton, 2 Ves. 327.

electing directors for a limited period, and themselves composing the corporation. Amendments to the charter, not in violation of its objects, may be accepted by the shareholders. But in eleemosynary corporations there are no stockholders, and regulations which in ordinary corporations are made by the members, and disputes that are submitted to the courts, are made and decided by persons who are intrusted with the visitorial power. The visitor is the judge or arbiter to determine all controversies not involving the integrity of the management of the fund, or the observance of the statutes of the founder, and he alone can make regulations and by-laws that will bind the officers.¹ To all eleemosynary corporations a visitorial power attaches as a necessary incident, which, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitorial power is deemed to belong to them in their corporate character. When a private eleemosynary corporation is thus created by a charter from the State, it is subject to no other control on the part of the State than what is expressly or impliedly reserved by the charter. Unless a power be reserved for this purpose, the State cannot, by virtue of its prerogative, without the consent of the corporation, alter or amend the charter, divest the corporation of its franchises, add to them, or add to or diminish the number of trustees, remove any of the members, change or control the administration of the charity, or compel the corporation to receive a new charter.² When the selectmen of a town have been designated as the visitors of an eleemosynary corporation by its founder, in the powers to be thus exercised by them, they are not agents of the town, nor acting directly in relation to its interests, or accountable to it, and they cannot therefore be directed, controlled, limited,

¹ State v. Adams, 44 Mo. 570.

4 Wheat. 518; Atty. Genl. v. Lock, 3

² Dartmouth College v. Woodward, Atk. 164.

or restrained in the exercise of their powers by the town. They have special authority created by the founder, and confirmed by the act of incorporation. The trustees and visitors, in such a case, taken together, each acting in their own sphere, constitute the government of the charitable institution; and until they have acted contrary to law, and in violation of their trust, no breach can be held to exist. And this visitorial power must extend to all cases where, by the will, the trustees are in the first instance to exercise their judgment and discretion.¹

As to the authority vested in the visitor, the question is not what was reasonable or fit for the founder to do, but what he has done in his statutes. Every man is master of his own charity, to appoint and qualify it as he pleases. If the visitor has the power to proceed to sentence in a particular event, the sufficiency of the sentence cannot be called in question, nor any inquiry be made in the common law courts, as to the reasons or causes of the sentence. If the visitor has jurisdiction of the subject and person, his sentence is final, unless the founder has given the right of appeal.² A charity must be accepted upon the terms pro-

¹ Nelson v. Cushing, 2 CUSH. 519. SHAW, J.: "When a general visitorial power is provided by the founder of an eleemosynary corporation, no court of either law or equity will interfere to control or direct the ordinary exercise of such visitorial power, subject to the limitation only, that when the visitors in the exercise of their power act contrary to law in a matter, amounting in effect to a breach of trust, then a court of equity, under its ordinary jurisdiction, will interpose upon the application of the attorney-general, as the representative of the public, to prevent and restrain such breach of trust, and even if need be to remove a trustee and substitute another."

² Philips v. Bury, 2 Term Rep. 346,
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per Lord HOLT. The visitorial power is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of the charity. It is not a power to revoke the gift, to change its uses, or to divest the rights of the parties entitled to the bounty. Allen v. McKean, 1 Sumner, 276. Application for a mandamus to the dean and chapter of the cathedral church of R., commanding them to restore the head-master of the cathedral grammar-school to his place and office, he having been removed by the dean and chapter because of his publishing a pamphlet which it was claimed was a libel on the bishop of R. By the foundation, the bishop of R. was made a visitor of the grammar-school. It

posed. It cannot be altered by any agreement between the heirs of the donor and the trustees or donees, even where the donor reserved to himself and his heirs visitorial power. But it will be carried into effect according to the intention of the donor. And in like manner when the mode of its execution is indicated, that mode will be pursued unless it is impracticable, in which case it may be altered by *cy pres*.¹ If the power of the visitor is unlimited and universal, he has in respect to the foundation and property moving from the founder no rule but his discretion. When there are particular statutes, he is bound by them; and if he acts contrary to or exceeds them, he does so without jurisdiction.² Trustees cannot visit themselves; they cannot be visitors and visited.³ In England the office of visitor is generally withheld from trustees who hold the fund, in order that they may be visited.

§ 354. Right of appeal.—At common law visitors of a corporation appointed by the founder are supposed to have committed to them exclusive cognizance of such matters as are clearly within their jurisdiction, without review or appeal; and it would be deemed a violation of the rights of the founder, as expressed in the instrument by which he creates the trust, to substitute any other tribunal.⁴ “Visitorial power, however depreciated for the rule, is certainly very

was held that as the dean and chapter acted within their jurisdiction, if they had been guilty of excess and wrong in the exercise of their power, the remedy was by application to the visitor, and the court had no jurisdiction. *Regina v. Dean, etc., of Rochester*, 6 Eng. L. & Eq. 269.

¹ *Gilman v. Hamilton*, 16 Ill. 225; *State v. Adams*, *supra*.

² *Green v. Rutherford*, 1 Ves. 462. If the donor gives a legal estate, or an estate in trust without a declaration of a special trust, it will fall under the power of the general visitor to judge of the legal property in the one case, and

the equitable in the other. But if though the legal estate is in the corporate body, it is on a special trust for a particular person described, this puts an end to the visitor's power over it. The court must determine the construction of the words of the instrument creating the trust, and will lay down rules for the execution of the trust. *Ibid.*

³ *Fuller v. Plainfield Academic School*, 6 Conn. 532.

⁴ *Rex v. Bishop of Ely*, 2 Term Rep. 290; *Philips v. Bury*, Ib. 346; *Reg. v. Dean of Chester*, 15 Q. B. 513. See *Latimer v. Eddy*, 46 Barb. 61.

convenient for these learned bodies. It is a *forum domesticum*, calculated to determine *sine strepitu* all disputes that arise within themselves, and the exercise of it is in no instance more convenient than in that of elections. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty ; while he who has the right may possibly be kept out of the profits of what is in itself but a temporary subsistence.”¹ When the articles of foundation provide that a party aggrieved may have recourse by appeal to the justices of the Supreme Court of the State in case the visitors exceed their jurisdiction and constitutional power, the appeal is but a limited one, and the justices cannot go into a hearing *de novo* of the allegations and defense, or of the evidence, but can only inquire, in the words of the statute, whether the visitors have exceeded their jurisdiction, or have acted contrary to the statutes of the founders.²

¹ Rex v. Bishop of Ely, 1 Wm. Blk. 71. See Atty. Genl. v. Talbot, 3 Atk. 662. When there is no doubt about the person of the visitor the court will grant a mandamus to compel him to receive an appeal. But if the visitor has actually executed a sentence of expulsion, though he may appear to have exceeded his jurisdiction, a mandamus will not lie to restore the party expelled, for that would be to command the visitor to reverse his own sentence. 2 Kyd on Corp. 281.

² Murdock v. Phillips Academy, 7 Pick. 303; 12 Id. 244. In this case it appeared that the constitution of the theological seminary in Phillips Academy provided that every professor in the institution should be under the immediate inspection of the trustees, and be removed by them for any just and sufficient cause. By the statutes of the associate foundation the visitors were

empowered to hear appeals from decisions of the board of trustees. The plaintiff having been removed from his professorship by the board of trustees, appealed to the visitors, who affirmed the action of the trustees ; whereupon an appeal was taken to the Supreme Court of the State, which held that the trustees and visitors had acted within their visitorial powers, and that their judgment must stand. The plaintiff being paid his salary to the time of his removal by the trustees, brought an action for the amount earned between that time and the decision of the Supreme Court. It appeared that the trustees when the matter was before them proceeded to pass a vote for removal, avowedly upon the recommendation of a committee appointed to investigate the case, and upon certain reasons and facts stated in their report, without citing the accused before them, or giving

CHAPTER XXII.

APPOINTMENT OF RECEIVER.

<p>§ 355. Application for receiver. 356. Jurisdiction of court. 357. Notice to the defendant. 358. Power of court exercised with caution. 359. Grounds for appointment of receiver. 360. Who to be appointed receiver. 361. Revocation of appointment. 362. Effect of appointment. 363. Bond of receiver. 364. Position of receiver in relation to property. 365. Possession of receiver protected by court. 366. Duty of receiver in relation to debts.</p>	<p>§ 367. Power of receiver to compromise claims. 368. Certificate of indebtedness. 369. Sale of corporate property by receiver. 370. Suits by receiver. 371. Set-off against receiver. 372. Liability of receiver for contempt. 373. Suits against receiver. 374. Counsel fees. 375. Care of funds. 376. Disbursements by receiver. 377. Investigation of receiver's accounts. 378. Compensation of receiver.</p>
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§ 355. **Application for receiver.**—A motion for a receiver relates only to the preservation of the property of the corporation, which is a trust fund for the payment of its creditors. They have a right, before proceeding to judgment and execution, to file a bill against the corporation to pre-

him an opportunity to be heard by counsel. The visitors, however, allowed him a full hearing upon the articles exhibited before them, and found him guilty as charged. It was held that the proceeding of the trustees being but an *ex parte* examination, it did not affect the title of the plaintiff to his office, or his actual possession and enjoyment of it ; that the decision of the visitors was a final decree, and from that time the plaintiff must be taken to have forfeited his office and salary ; that had the trus-

tees proceeded legally and regularly against the plaintiff in their judicial capacity the decree of the visitors affirming and ratifying their action would have related back to the decree of the trustees, and the plaintiff could not have recovered for salary afterward ; but that as the decree of the trustees as rendered could not operate to prejudice the rights or interests of the plaintiff, it could not be made valid by any subsequent proceedings of the visitors.

vent a misapplication of the trust fund and to secure its employment for its legitimate uses, viz.: the payment of the corporate debts. The court, in order to accomplish this object, may either appoint a receiver or require security for the due preservation and appropriation of the property.¹ An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival corporation, cannot be maintained for the purpose of dissolving or restraining another association or company of which the nominal plaintiff may be a member. Hence, when in a suit, the object of which was to obtain the appointment of a receiver of an express company, it appeared that the plaintiff was not the real party in interest, but that the suit was prosecuted wholly at the instigation and for the benefit of rival express companies, the motion for a receiver was denied.² A receiver will not be appointed upon the petition of the holder of a very small amount of the stock of the corporation, except upon his executing a bond of indemnity against damage to the other parties.³ The fact that a mortgagee has not complained of the management of the property, though he has not received his interest for a long series of years, does not preclude him from subsequently applying for a receiver. In *Fripp v. Chard R.R. Co.*,⁴ it was said by the court that a party having a large interest in the property would be listened to on his appli-

¹ *Conro v. Gray*, 4 How. Pr. 166. In New York, under the statute of 1883, ch. 378, a petition for the appointment of a receiver must be made in the county where the principal business office of the corporation is situated or in the adjoining county. *U. S. Trust Co. v. N. Y. West Shore, etc., R.R. Co.*, 67 How. Pr. 390.

² *Waterbury v. Merchants', etc., Express Co.*, 50 Barb. 157. In New York, where the petition did not allege any of the grounds mentioned in

the act in relation to banking associations, it was held that the court would not assume jurisdiction at the instance of a creditor at large to dissolve such an association and wind up its affairs by the appointment of a receiver. *Parmly v. Tenth Ward Bank*, 3 Ed. Ch. 395.

³ *Addison v. Lewis*, 75 Va. 701.

⁴ 21 Eng. L. & Eq. 53. See *Galway v. U. S. Steam Sugar, etc., Co.*, 13 Abb. Pr. 211.

cation, though such might not be the case if he came under suspicious circumstances and only had a small interest. A corporation cannot, in its corporate capacity and name, apply to be placed in the custody of a receiver.¹

§ 356. Jurisdiction of court.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. It is exercised when an estate or fund is in existence and there is no competent person entitled to hold it; or the person so entitled is in the nature of a trustee and is misusing or misapplying the trust; or the property is about to be removed beyond the reach of the court; and generally when it is necessary to secure rights and prevent a failure of justice. The property is thus placed in the hands of an officer of the law in order that it may be under the protecting care and control of the court and be delivered unimpaired to the persons to whom it is legally ascertained to belong.² A bridge company was sued for a tort in the Circuit Court of the United States; execution issued and returned "nothing found"; alias writ of *fitz fa* taken out and levied on the bridge, and the marshal proceeded to sell the rents and profits of the same for the term of one year, at which sale the judgment creditor became the purchaser. He thereupon demanded of the corporation possession of the bridge so that he might obtain the tolls, but was refused. He then, with other creditors, filed a bill in equity, praying that the court would appoint a suitable receiver to take possession of the bridge,

¹ Kimball v. Goodburn, 32 Mich. 10. Newell v. Smith, 49 Vt. 255; Ohio, etc., R.R. Co. v. Davis, 23 Ind. 553; Stevens v. Davison, 18 Gratt. 819; Meyer v. Johnston, 53 Ala. 237; Skinner v. Maxwell, 66 N. C. 45; Battle v. Davis, Ib. 252; Cowdrey v. Galveston, etc., R.R. Co., 93 U. S. 352. See Emerson's Appeal, 95 Pa. St. 258; Bruce v. Manchester, etc., R.R. Co., 19 Fed. Rep. 342.

² Podmore v. Gunning, 5 Sim. 485; Gibbons v. Mainwaring, 9 Id. 77; Lawrence v. Greenwich Fire Ins. Co., 1 Paige Ch. 587; Sandford v. Sinclair, 8 Id. 373; Orphan Asylum v. McCarter, Hopk. Ch. 429; Willis v. Corlies, 2 Edw. Ch. 281; Conro v. Port Henry Iron Co., 12 Barb. 27; 4 How. Pr. 166;

receive the tolls and income, and apply them to discharge the judgments at law after defraying expenses. The court rendered the decree prayed for, from which the bridge company appealed. It was held that the court below had power in the premises and that it was properly exercised.¹

The power to appoint a receiver is most usually called into exercise either to prevent fraud or to keep the subject of litigation from injury or threatened destruction. He is an indifferent person between the parties, appointed by the court on behalf of all of them, and not of the complainant or defendant only, to receive the thing or property pending the suit; and a corporation whose property is proposed to be thus taken should be made a party to the proceeding, so that it may, if it choose, resist the application.² A court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns in the absence of a statute conferring such power. The court may compel the officers of a corporation to account for a breach of trust, but the jurisdiction for that purpose is over the officers personally, and not over the corporation.³ When the statute authorizes the court to appoint a receiver "if the circumstances of the case and the ends of justice require it," the exercise of the power by the court is discretionary.⁴ Where a statute provides that the court may appoint a receiver "upon the petition of the person obtaining judgment," the petition of A. B., who

¹ Covington Drawbridge Co. v. Shepherd, 21 How. 112.

² Baker v. Administrator, etc., 32 Ill. 79.

³ Neall v. Hill, 16 Cal. 145. In this case, an order of the court appointing a receiver and decreeing a sale of the property and a settlement of the corporate affairs on the petition of a stockholder, was held error. COPE, J., said: "The decree if permitted to stand must necessarily result in the dissolution of

the corporation; and, in that event, the court will have accomplished in an indirect mode that which in this proceeding it had no power to do directly." See Howe v. Dewel, 43 Barb. 504; Bayless v. Orne, Freeman (Miss.) Ch. 161; Strong v. McCagg, 55 Wis. 624; Follett v. Field, 30 La. Ann. 161; Hardon v. Newton, 14 Blatchf. 376; Converse v. Dimock, 22 Fed. Rep. 573.

⁴ Oakley v. Paterson Bank, 1 H. W. Green (N. J. Ch.) 173.

describes himself as the attorney of C. D., the judgment creditor, confers no more jurisdiction on the court than if A. B. had been an entire stranger to C. D.; and an order made upon such a petition for the sequestration of the property of the corporation, and for the appointment of a receiver, is void. Nor will a subsequent application in the same matter, and an order of the court to amend the petition, cure the defect.¹ By the statute of New Jersey a receiver may be appointed upon the petition of a stockholder of an insolvent corporation. But the appointment being in the discretion of the court, it will not be made if it appears that the management of the directors, who are closing up the enterprise, will be more advantageous to the stockholders and creditors than that of a stranger would be.² The statute of Maine leaves the number of receivers to be appointed of the effects of an insolvent bank in the discretion of the court, and this discretion is not limited to the first exercise of it. Hence if one of the receivers originally appointed has been removed, the court may, if it think best, fill the vacancy.³

§ 357. Notice to the defendant.—As a general rule a receiver will not be appointed before the defendant has had an opportunity to be heard, except when such defendant has fraudulently withdrawn himself from the jurisdiction of the court to prevent the service of process upon him. But under special circumstances where it is necessary to appoint a receiver of the property of an absentee to prevent its being wasted or removed beyond the jurisdiction of the court,

¹ Bangs v. McIntosh, 23 Barb. 591. See Howe v. Dewel, 43 Id. 504; Waterbury v. Union Express Co., 50 Id. 157; Belmont v. Erie R.R. Co., 52 Id. 157.

The remedy of appointing a receiver is summary and of serious consequence. It is not like a creditor's bill, a proceeding in behalf of a

creditor; for the creditor in instituting the proceedings obtains no preference, and is only to be paid ratably with the other creditors.

² City Pottery Co. v. Yates, 37 N. J. Eq. 543. See Pa. R.R. Co. v. Pember-ton, etc., R.R. Co., 28 Id. 338.

³ Wiswell v. Starr, 50 Me. 381.

or there are choses in action which would be in danger of being lost if not collected immediately, a receiver will be appointed *ex parte*.¹ Under the statute of Michigan which provides for the winding up in equity of insolvent corporations on the petition of creditors, the appointment of a receiver is not a matter of course on a *prima facie* case. The defendant must have an opportunity of being heard by answer.² In a case in Ohio it was held that the appointment of a receiver of a railroad company without giving notice to the company beforehand, there being no obstacle to the giving of such notice, where no fraud or insolvency was charged against any of the parties, and where there was no danger of the removal of the property of the company beyond the jurisdiction of the court, was an unwarrantable exercise of judicial power.³

§ 358. Power of court exercised with caution.—It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except when the exercise of such an extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other course or mode of proceeding.⁴ It is not sufficient ground for the appointment of a receiver that a trustee mixes the trust funds with his own, when there is

¹ Verplanck v. Mercantile Ins. Co., 2 Paige Ch. 438; Sandford v. Sinclair, 8 Id. 373; Conro v. Port Henry Iron Co., 12 Barb. 27; People v. Albany, etc., R.R. Co., 55 Id. 344.

² Cook v. Detroit, etc., R.R. Co., 45 Mich. 453.

³ Cleveland, etc., R.R. Co. v. Jewett, 37 Ohio St. 649.

⁴ Overton v. Memphis, etc., R.R. Co., 10 Fed. Rep. 866; S. C. 3 McCrary, 436; Pullan v. Cincinnati & Chicago Air Line R.R. Co., 4 Biss. 35; Tyson

v. Wabash R.R. Co., 8 Id. 247. The existence of disputes between different members of the governing body of a corporation which prevent its affairs from being carried on properly, is a ground for the intervention of the court by injunction and receiver to protect the corporate property; but the interference of the court will be continued only until a governing body is duly appointed. Featherstone v. Cooke, L. R. 16, Eq. 298.

no allegation that the fund is in danger, nor denied that the trustee keeps accounts. The court will not appoint a receiver merely because the measure will do no harm; nor when the trustee is acting under the appointment of a testator.¹ After the division of the Society of Friends into Hicksites and Orthodox, the former remained in possession of the real estate of the society, and the latter filed a bill praying that a receiver might be appointed pending the suit to determine which body was entitled to the property. There was no proof or allegation that the property was exposed to injury or destruction in consequence of its being in the possession of the defendants pending the litigation. It was held unnecessary to appoint a receiver, and that such an appointment would be inconsistent with the principles by which the court was governed; that the court ought not to interfere in this manner when the plaintiffs' right was not perfectly clear, and the property itself, or the income arising from it, was not shown to be in danger.² The appointment of a receiver will not be made if from the evidence the court is clearly of the opinion that much greater injury will result from so doing than by leaving the property in the custody of those holding it. A court will be especially reluctant to appoint a receiver over the extensive line of a railroad company—which is a *quasi* public corporation—and it will only do so when the exigencies of the case seem imperatively to demand it.³

The case ought to be one of great urgency in which a court should appoint a receiver to operate a railroad. It might instead be sometimes expedient to require the earnings of the road to be paid over to, and be dispersed by

¹ *Orphan Asylum v. McCartee*, 1 Hopkins Ch. 429. Misconduct which occurred several years previous is no ground for apprehension of impending mischief. *Kean v. Colt*, 1 Halst. Ch. (N. J.) 365. The appointment of a receiver to take charge of property which

is in the possession of a mortgagee after forfeiture, will be set aside. *Patten v. Accessory Transit Co.*, 13 How. Pr. 502.

² *Willis v. Corlies*, 2 Edw. Ch. 281.

³ *Tyson v. Wabash R.R. Co.*, 8 Bissell, 247; *Stevens v. Davison*, 18 Gratt. 819.

a suitable person, and to prevent by injunction any interference of others with the management in the meantime. Mere poverty is not a sufficient ground for taking from those having charge of a railroad the interim management and placing it in the hands of a receiver.¹ The court has power pending a suit for the foreclosure of a railroad mortgage, on notice, to appoint a receiver with authority to repair the road, to operate it, complete unfinished portions, and to procure rolling stock ; and, for these purposes, to raise money by loan to an amount named in the order, he issuing certificates of indebtedness therefor, to be a first lien on the property. "It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."² In Meyer v. Johnston, *supra*, the court said : "If the action of the chancellor in appointing a receiver of a railroad company goes to the extent of taking the property of the company into his hands for the purpose through his appointees of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and, to that end, of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of the latter, he has exceeded his jurisdiction. No such power is vested or resides in any judicial tribunal. Nor can a mortgagor by anything that may be inserted in a second or other subsequent mortgage confer on a court or chancellor the power to supersede rights created by an earlier mortgage. . . . It is within the province of a court in aid of its judicial function to exercise an *interim* management of a going concern with a view to the sale of it as such during the pendency of a controversy, in which the rights therein of conflicting claimants are to be de-

¹ Meyer v. Johnston, 53 Ala. 237. Co., 106 U. S. 286. See Wallace v.

² Miltenberger v. Logansport R.R. Loomis, 97 Id. 146.

terminated. But it is no part of the office of a court to take upon itself the execution simply of schemes or projects of either private or public utility. But it does not follow that a chancellor who takes property in litigation by his receivers and managers under the charge of the court, is incompetent to raise money when necessary for the expense of its custody and preservation by issuing certificates of indebtedness that shall constitute first liens. Property in that condition must be taken care of by the court, and the expense of this must be paid. Generally this is done out of the income. But if there be no income, or it is inadequate, and it is necessary for the conservation of the subject-matter of the suit that money be used, the expenses thus incurred must then fall on the *corpus* of the property."

§ 359. **Grounds for appointment of receiver.**—When in the opinion of the court the exigencies of the case seem to warrant it, the court will appoint a receiver, and clothe him with the necessary powers. To secure a valuable land grant to a railroad company which it was in danger of losing because of inability to finish the road in the required time, a receiver was appointed with authority to finish the road, and, to that end, to borrow money, giving therefor a mortgage on the entire line, which should take precedence as a lien of all other incumbrances.¹ If those who own a majority of the stock do not elect directors to take charge of the property of the corporation, the minority are not to be sufferers in consequence of such neglect. Under such circumstances, it is proper for the court to appoint a receiver to take charge of the estate of the corporation and preserve it for the benefit of the stockholders.² In general, when personal property, or the rents and profits of real estate in dispute, are in imminent danger of being

¹ Kennedy v. St. Paul, etc., R.R. Co.,
² Dillon, 448. ² Lawrence v. Greenwich Fire Ins.
Co., 1 Paige Ch. 587.

wasted or lost, a receiver may be appointed to take care of it, during the controversy, for the benefit of all concerned.¹ Under the New York Code, a receiver may be appointed before judgment in any action on application of either party upon proof that the property, or its rents and profits, are in danger of being lost or materially injured or impaired.² An interlocutory motion, on *ex parte* affidavits, for a receiver to take charge of the business and affairs of a corporation for the time being, and to have its condition examined by an account to be taken under the direction of the court with a view to an ultimate determination of the question whether the corporation shall be allowed to go on, or be arrested in its operations, cannot be granted with the issue yet untried and undetermined, unless on the affidavits before the court it appears beyond the possibility of doubt that in the final decision of the cause the relief prayed for in the complaint must be granted. Personal misconduct of the executive or managing committee of a corporation has nothing to do with a motion for a receiver. The unfaithfulness or misconduct of some, or even of all, of the trustees or managers of a joint stock association affords no ground for taking away the rights of its shareholders, either by dissolving it, or placing its management in the hands of an officer of the court.³ In a suit brought by the stockholders of the Erie Railroad Company against the company and its directors, seeking the removal of the latter, and the appointment of a receiver of all of the property,

¹ State v. Northern, etc., R.R. Co., 18 Md. 193.

² Ireland v. Nichols, 37 How. Pr. 222. See Thompson v. Sherrard, 35 Barb. 593. A receiver of an insolvent railroad company may be appointed before the company has neglected to fulfil its obligations to the petitioner. Brassey v. New York, etc., R.R. Co., 19 Fed. Rep. 663.

³ Waterbury v. Merchants' Union Express Co., 50 Barb. 157; People v. Alb., etc., R.R. Co., 55 Id. 344; La Grange v. State Treasurer, 24 Mich. 468; Cicotte v. Anciaux, 53 Id. 227; Galvenstine's Appeal, 49 Pa. St. 310; Einstein v. Rosenfield, 38 N. J. Eq. 309; Karnes v. Rochester, etc., R.R. Co., 4 Abb. Pr. N. S. 107.

rights of action, and records of the company, the court said : "A stockholder of an incorporated company may have an injunction to restrain illegal acts of the directors, and, in certain cases, the appointment of a receiver of a particular fund, the proceeds of an unlawful act. But the bill in this action, while neither charging insolvency, nor asking to dissolve and wind up the company, prays that a receiver may be appointed of all and singular the funds, books, papers, and rights of action of the company ; and since the plaintiffs bring this action as stockholders, as such, they have no standing in court to obtain the relief they seek."¹ The statute of Rhode Island provides that if, upon an affidavit of the bank commissioners, substantiated by an examination by the court of the officers of a bank, the court is of the opinion that the charter of the bank is forfeited at law, or that the bank is so managed that the public or those having funds in its custody are in danger of being defrauded, or that it has become insolvent, the court shall issue an injunction and appoint a receiver to take possession of the assets of the bank and settle up its affairs. In order to justify the action of the bank commissioners or the court under the statute, it is not necessary to suppose a design on the part of the managers of the bank to cheat its creditors. It is not fraud of the managers, but danger that the creditors may be defrauded by the management of the bank, that is the ground of interference ; and this danger must exist at the time of the application for a receiver, leaving past mismanagement to be dealt with on special grounds.²

§ 360. Who to be appointed receiver.—In the appointment of a receiver some entirely indifferent person should be selected. There are persons who, owing to their position,

¹ Belmont v. Erie R.R. Co., 52 Barb. 637. See Samuel v. Holladay, Woolw. 400. ² Bank Commissioners v. R. I. Centr. Bank, 5 R. I. 12.

are not usually competent to act. A party to the suit, or a party interested in the suit, is, as a rule, disqualified; though there may be occasions in which this rule will yield to the exigencies of the case. The same may be said of a trustee who is to see that the receiver performs his duty, and who may, in a special case, be appointed, he engaging to act without pay.¹ The son of a next friend suing for an infant, ought not to be a receiver; nor a person whose position may cause embarrassment in the administration of justice, as a master in chancery whose duty it is to pass the accounts and control the conduct of the receiver.² Where, after a receiver had been acting several months, it was discovered that he was a director of the corporation, he was not removed, but the case was referred to a master with liberty to the parties to propose as receiver the person already appointed; the existing receiver to continue in the discharge of his duties until a new receiver was appointed and his appointment confirmed.³ When the appointment is regular, and the bond ample, the receiver will not be removed merely because the counsel for the complainant has also

¹ *Fripp v. Chard R.R. Co.*, 21 Eng. L. & Eq. 53; *Benneson v. Bill*, 62 Ill. 408. A trustee of an infant's estate is not as a general rule a suitable person to be appointed a receiver with emoluments. The infant, if he is to pay a receiver, is entitled to have his judgment checked by the person executing the power, which is to be done as coupled with a trust. *Sutton v. Jones*, 15 Vesey, 584.

² *Bank of Monroe v. Schermerhorn*, 1 Clarke Ch. 366.

³ *Ibid.* It was held in New Jersey that in proceedings against an insolvent corporation a person connected with the management would not be appointed receiver. *Freeholders v. State Bank*, 28 N. J. Eq. 166. An act of New York for the voluntary dissolution of corporations provided that any of the directors,

trustees, or other officers, or any of the stockholders might be appointed receivers. Any creditor nevertheless, upon good cause shown, could object, either before or after the appointment, and designate a more suitable person to take the place of the nominee of the corporation. *Matter of the Bowery Bank*, 16 How. Pr. 56. Though the principle adopted in the case of *Atty. Genl. v. Bank of Columbia*, 3 Paige Ch. 511, that the officers of an insolvent corporation should not be appointed its receivers, may have been proper when the suit was instituted as an adversary proceeding against the corporation and its officers, it would not have been applicable to a proceeding under the foregoing article of the New York statute. *Matter of the Eagle Iron Works*, 8 Paige Ch. 385.

acted as counsel for the receiver on some occasions. But the fact that a person who frames the bill is the legal adviser of the complainant as well as of the corporation, and that he is the largest creditor, disqualifies him from acting as receiver.¹ A person will not be appointed receiver who is known to have been guilty of conduct which shows him to be untrustworthy ; nor one who from his relations with the case, or with the parties to it, cannot be presumed to be disinterested. Nor would the court favor the appointment of one against whom the plaintiff has objections ; nor a person with whom the court has no personal acquaintance.² If there is apparently no urgent necessity for the immediate appointment of a receiver, the proceedings will be suspended pending a decision on an appeal from an order making such an appointment.³

The receiver has no power to appoint deputies to be paid out of the fund in his hands. He may, under some circumstances, have a general allowance fixed by the court for the employment of a competent person to take charge of and wind up the business. Although in cases presenting difficult questions a receiver, instead of taking up the time of the court with frequent applications, may apply to counsel, yet this should be done either with the sanction of the court, or at his own expense.⁴

§ 361. Revocation of appointment.—When a person produces the proper record evidence of his appointment as receiver it is conclusive of his right until impeached. It is immaterial that the order appointing him is erroneous or improper, or ought not to have been made ; while it is a subsisting order it is not competent for any one to interfere with his possession. If a party feels aggrieved by the order

¹ Baker v. Administrator, etc., 32 Ill. 79.

² Smith v. N. Y. Consolidated Stage Co., 28 How. Pr. 208; 18 Abb. Pr. 419.

³ Atty. Genl. v. Bank of Columbia, *supra*.

⁴ Corey v. Long, 43 How. Pr. 492; 12 Abb. Pr. N. S. 427. See Batten-shall v. Davis, 31 Barb. 323.

of the court making the appointment, he must institute proceedings to test its validity.¹ The court will revoke an appointment procured by fraud or collusion. Presumptively such an appointment endangers the rights of the creditors; and when an appointment is so made, the court will not stop to inquire whether or not it has resulted in the selection of a suitable person.² If a statute provides that if any railroad company in the State fail or neglect to run daily trains on its road for the space of ten days, the chancellor shall, upon petition, appoint a receiver to take possession of the property of the company and operate the road for such time as the chancellor may direct; when the public exigency which led to the passage of the act ceases, and sufficient reason is shown for relieving the company from the operation of the order, the court will restore to it the property.³ From an order of the court removing the receiver, and directing him to make a report of the property and money which came into his hands, he has no right of appeal.⁴

Where a statute provides that the State treasurer, secretary, and auditor shall appoint a receiver of the assets of an insolvent bank, the power of removal is not incident to the

¹ Vermont, etc., R.R. Co. v. Vermont Cent. R.R. Co., 47 Vt. 792; Corey v. Long, 43 How. Pr. 492. See Atty. Genl. v. Guardian, etc., Ins. Co., 77 N. Y. 272. If the order directing the manner in which the receiver shall proceed is irregular or improvident, its correction must be sought by a motion to the court which made it. There is no authority that will sustain an independent action for that purpose, even though the plaintiff was not a party to the proceeding in which the order was made. If the court which made the order has jurisdiction over the parties and the subject-matter by means of the proceedings already taken before it, even though the order then made prove to be irregular and improvident, it cannot for those reasons

be questioned or assailed in a collateral proceeding. In New York the statute makes a stockholder a party to the proceedings for the appointment of a receiver, and if the latter fails in his duties as trustee of the creditors and stockholders, or if he lends himself to the creditors to the unnecessary prejudice of the stockholders, the court before which the proceedings are taken will, upon that fact being shown, interfere on the application of any stockholder, and set them aside. Libby v. Rosenkrans, 55 Barb. 202.

² Lottimer v. Lord, 4 E. D. Smith, 183.

³ *In re Long Branch, etc., R.R. Co.*, 24 N. J. Eq. 398.

⁴ Ellicott v. Warford, 4 Md. 80.

power of appointment. In such case the duties of the receiver are his own, imposed directly upon him by the statute in virtue of his office, and not as the agent or subordinate of the power by which he is appointed, and to which he is not accountable.¹

§ 362. **Effect of appointment.**—The preservation of the fund being the main, if not the sole, object of a receivership, it is incorrect to suppose that the appointee is the receiver of the party applying for his appointment, and is to act under his advice or that of his counsel. It is the receiver's duty to act with a view to the equitable rights of all of the parties in interest, and to dispose of the property under the orders of the court exclusively.² If a receiver is appointed on the application of a creditor or subsequent incumbrancer, the order, after directing the appointment of the receiver and prescribing his duties, usually states that the appointment is not to affect prior incumbrancers who may think proper to take possession of the property by virtue of their securities. Under such an order, the reservation to prior incumbrancers of the right to take possession is not intended to authorize them to disturb the possession of the receiver, but to designate the future exercise in their behalf of the authority of the court. It does not warrant a mortgagee of the legal estate to enter upon it and oust the receiver, or collect the rents, or bring an action of ejectment to recover the possession.³ The appointment of a receiver of an insolvent corporation does not *ipso facto* have extraterritorial force to vest in him title to corporate property, nor will the comity of States give effect to such an appointment to the prejudice either of the rights of citizens or the interests of the foreign State in which the property is situated.⁴ The sequestration intended to be

¹ *State v. Claypool*, 13 Ohio St. 14.

³ *Beverley v. Brooke*, 4 Gratt. 187.

² *Lottimer v. Lord*, 4 E. D. Smith, 183; *Ellis v. Boston, etc., R.R. Co.*, 107 Mass. I.

⁴ *Receiver v. First Nat. Bank*, 34 N. J. Eq. 450. As the appointment of a receiver works an involuntary transfer

made for the benefit of all of the creditors by one general process, must be considered as taking effect not merely from the time of the appointment of a receiver, which is an incidental step, but from the filing of the bill, or at least from the issuing of an injunction, and supersedes a proceeding instituted for the benefit of a particular creditor, and prevents and defeats preferences by subsequent attachments on mesne process, though made before the receiver was appointed.¹

of the corporate property to him, if there is a subsequent attempt to procure an involuntary transfer in another State for the benefit of a creditor there, the first transfer must prevail. Osgood v. Maguire, 61 N. Y. 524. An order of court appointing a receiver does not of itself dissolve the corporation. In the absence of such dissolution the transfer of the corporate property to a receiver under judicial proceedings in a foreign jurisdiction will not prevail against an attachment in trustee process in Massachusetts in favor of a citizen of that State. After the corporation and receiver have submitted to the jurisdiction of a court of the State, consented to judgment against the corporation as still existing, judgment has been rendered accordingly and affirmed on appeal, it is too late for the receiver to set up for the first time that the corporation had ceased to exist before the action was brought. Taylor v. Columbian Ins. Co., 14 Allen, 353.

¹ *Atlas Bank v. Nahant Bank*, 23 Pick. 480. A., on the 1st of October, 1837, assigned all of his real estate for the benefit of his creditors. B., on the 4th of November thereafter, obtained a judgment against A., which was the first in order of time. On the 28th of September, 1838, B., whose execution was returned unsatisfied, filed a bill in equity for the purpose of setting aside the assignment, and, on the 1st of No-

vember, 1838, a decree was rendered declaring the assignment void as to creditors, and directing the assignor to convey the assigned estate to a receiver, which A. did on the 5th of January, 1839. The defendant derived his title from a purchaser at a sale made by the receiver on the 7th of May, 1840. The plaintiff claimed title to the same premises by virtue of a sheriff's deed given in pursuance of a sale made May 30, 1840, under a judgment against A., recovered by C., between the 4th of November, 1837, and the 28th of September, 1838, that is before B. filed his bill, but after the rendition of the judgment in B.'s favor. C. was not a party to the bill. The court said: "The title of the receiver and of the purchaser from him rests upon the debtor's own conveyance made under the direction of the court, and has no relation to the judgment. When the creditor takes this course instead of falling back upon his legal remedy, he abandons the lien of his judgment and seeks satisfaction of his debt out of the debtor's property generally. But no creditor having a statutory lien by judgment can be compelled to take the equitable remedy. If his judgment has been recovered before other creditors have instituted proceedings in equity, nothing in the course or in the result of those proceedings can affect his rights. The title derived from the re-

§ 363. Bond of receiver.—When the bond given by the receiver and his sureties is that he will faithfully discharge the duties imposed upon him as receiver, it is immaterial that the bond is made payable to specified creditors, it being for the benefit of all who prove that they are entitled to an interest in the funds secured, though not named as obligees in the bond.¹

§ 364. Position of receiver in relation to property.—When an order of reference is made for the appointment of a receiver to be selected by a referee, and he is subsequently appointed, his title vests by relation from the date of the order, and attaches with the same effect as if the order instead of directing a reference had named the receiver.² An order appointing a receiver and giving him possession does not in any manner affect the title of the property, but he holds it as a mere custodian until the rightful claimant is ascertained by the court, and then for such claimant.³ When land to which the corporation has color of title is in his possession, the rights of the corporation, whatever they may be, are in his custody, and no other court than the one which appointed him can try the question of title.⁴ It has been said that he represents the creditors and stockholders; but, for all the purposes of inquiry into his title, he represents the corporation. He is vested by law with the estate of the corporate body, and takes his title under and through it. The fact that he is a trustee for creditors and stock-

ceiver rests on the conveyance of the debtor, which the court compels him to make, and it must, therefore, in the absence of actual or constructive notice of the suit, be a title subject to all liens existing at the time of that conveyance in favor of persons who are in no way connected with the proceedings; and in no case can such title relate to any period of time anterior to the filing of the bill, so as to affect the legal rights of persons who do not voluntarily waive

them by uniting in the remedy." The title of the plaintiff was therefore held superior to that of the defendant. *Chautauqua Bank v. Risley*, 19 N. Y. 369.

¹ *Ross v. Williams*, 11 Heisk. Tenn. 410.

² *Rutter v. Tullis*, 5 Sandf. 610. See *Lottimer v. Lord*, 4 E. D. Smith, 183.

³ *Battle v. Davis*, 66 N. C. 252.

⁴ *Fort Wayne, etc., R.R. Co. v. Mellett*, 92 Ind. 355.

holders shows that they are the beneficiaries of the fund in his hands, without indicating the sources of his title or the extent of his powers.¹ So far as shareholders are concerned he can litigate respecting the fund upon precisely the grounds which would have been available to the corporation. In regard to creditors, however, it has been uniformly assumed that he succeeds to their rights and takes his title under them where conveyances otherwise valid have been made in fraud of their rights.²

¹ Alexander v. Relfe, 74 Mo. 495; Billings v. Robinson, 94 N.Y. 415; Cutting v. Damerel, 88 Id. 410, reversing S.C. 23 Hun, 339; Bristol v. Sandford, 12 Blatchf. 341. See Arenz v. Weir, 89 Ill. 25. The receiver of an insolvent corporation makes his title through the corporation. He cannot by his appointment acquire that which the corporation never had. He represents the creditors of the corporation in the administration of his trust, but his trust relates only to the corporate assets. As trustee for creditors, he represents them in following the assets of the corporation, and can assert their rights in cases where the corporation would not be heard. He is not a trustee for creditors in relation to assets which belong to them individually, or as a body. Jacobson v. Allen, 20 Blatchf. 525, per WALLACE, J. It was said by the court in Atty. Genl. v. Guardian Mut. Life Ins. Co., 77 N.Y. 272, that it was the settled doctrine that the receiver of an insolvent corporation represented not only the corporation, but also creditors and stockholders, and that, in his character as trustee for the latter, he could maintain an action as receiver to set aside illegal or fraudulent transfers of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied. A receiver, as the representative of creditors, may object that se-

curity was not made in such a manner as to be binding on the corporation. Stokes v. N. J. Pottery Co., 46 N.J. 237; Vail v. Hamilton, 85 N.Y. 453. As to the power of a receiver of a national bank, see Ellis v. Little, 27 Kansas 707.

² Curtiss v. Leavitt, 15 N.Y. 9. An act to incorporate the State Bank of Ohio, and other banking companies, created a board of control, and provided that, upon the insolvency of a branch bank, all of its property, credits, securities, liens, and assets should forthwith vest in, and be the property of the board of control for the uses and purposes declared in the act. Upon the happening of certain contingencies, this board was to appoint a receiver, who should take possession of the corporate books and property of every description, and hold the same for the joint use and benefit of the other branches of the State bank. The creditors of the failing branch, and the receiver so appointed, were, under the direction of the board, to proceed to settle up the affairs of the branch, convert its assets into money, and apply the money as further specified in the act. It was held that after the appointment of the receiver the board of control continued to sustain the relation of trustee, and was to be regarded as the legal owner of the assets; that the receiver in the discharge of his duties

A receiver takes notes and assets of the corporation subject to all of the conditions and legal disabilities with which they were trammelled in the hands of the corporation itself. He cannot impeach or disaffirm its authorized acts, nor the authorized acts of its agents. If a note in the hands of the corporation was void or incapable of enforcement by reason of fraud or illegality in its procurement or inception, passing it into the hands of a receiver does not purge it of those defects. In such cases the receiver stands precisely in the place of the corporation.¹ Although a judgment obtained against a corporation after the corporation has been dissolved and a receiver appointed is ineffectual, yet if a judgment be obtained, execution issued, and corporate property sold thereunder by the sheriff before the appointment of a receiver, such sale divests the corporation of its title to the property, and, consequently, the receiver cannot enforce a claim to it under his appointment.²

When a corporation enters into a contract, and subsequently the corporate effects pass into the hands of a receiver, and he performs the contract with the consent of the parties to it, whatever rights the corporation had under the contract appertain to him. A manufacturing company having made a contract with a town, afterward became insolvent, and its effects passed into the hands of a receiver, who fulfilled the contract. A creditor of the company

acted under the direction of the board; and that he was not delinquent in the discharge of his duties as a trustee to the prejudice of a beneficiary of the trust, by reason of his purchasing from the board in his own name and right the property of an insolvent branch which had in accordance with the act vested in the board. *Lafayette Bank v. Buckingham*, 12 Ohio St. 419.

¹ *Devendorf v. Beardsley*, 23 Barb. 656. The receiver of a bank is not to be treated as the holder of the paper of the bank. Representing the bank sim-

ply for the purpose of closing its concerns, he has no right in relation to paper held by the bank superior to that which the bank would have had if the management of its affairs had continued with the directors, and the liability of persons whose names are on such paper is not increased or changed by the appointment of the receiver. *Lincoln v. Fitch*, 42 Me. 456.

² *Frailey v. Central Fire Ins. Co.*, 9 Phila. 219; *McIlrath v. Snure*, 22 Minn. 391.

garnisheed the town for a balance due on the contract, and, on demand made by the officer, the town paid such balance to be applied on an execution against the company. No notice was given by the receiver or his attorney to the town not to pay the money. The receiver recovered from the town the full amount due on the contract. The court said : "The contract price was to go to the receiver, and was not open to the attachment of creditors of the insolvent company. There was no legal obligation on the part of the receiver to give notice to the town not to pay the money to the factorizing creditor. The law does not require every person to be on the alert to notice and warn people against claims made by others on his property."¹ A manufacturing company of New Jersey entered into a contract with two towns in Connecticut to build a bridge over a stream separating them. After the contract was executed the company became insolvent and a receiver of its effects was appointed by a court of New Jersey. For the benefit of the creditors of the company, and with its funds in his hands, he completed the contract by erecting the bridge. A creditor of the company attached a balance due from one of the towns on the contract. It was held that the title to the materials used in the construction of the bridge was in the receiver and not in the company, and that the money due for the work was also his, as much so as if he had purchased the property and business of the insolvent company and had erected the bridge in his own name.²

When a receiver of the effects of an insolvent corporation is appointed by a court of the State where the corporation was organized, the corporate property is not subject to attachment by a creditor of the corporation, even though

¹ Cooke v. Orange, 48 Conn. 401. ² Blake, etc., Co. v. New Haven, 46 See Ellis v. Boston, etc., R.R. Co., 107 Conn. 473.
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the receiver in the legitimate discharge of his duties takes the property into another State.¹ A receiver took possession, among other property of the corporation, of a barge. He afterward chartered the barge, and under the charter it was taken to another State, where it was attached. It was held that as the receiver had obtained rightful possession of the barge in the jurisdiction of his appointment, he could not be deprived of its possession by creditors of the insolvent debtor who resided in a foreign jurisdiction; that there was no abandonment of the barge by leasing it and suffering it to be taken out of the State, as chartering it for such a trip was but continuing its use in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors.² Although by the appointment of a receiver the title to the property of the corporation, which is in the State where the appointment is made, vests in the receiver, yet, as to real estate outside of the jurisdiction of the court, the appointment can have no such effect; but it remains the property of the corporation and can be disposed of by it or seized by its creditors the same as if a receiver had not been appointed.³

§ 365. Possession of receiver protected by court.—Inasmuch as a receiver is charged with responsible and often

¹ Pond v. Cooke, 45 Conn. 126.

² Chicago, etc., R.R. Co. v. Keokuk, etc., Packet Co., 108 Ill. 317.

³ Simpkins v. Smith, etc., Gold Co., 50 How. Pr. 56. In Nat. Trust Co. v. Miller, 33 N. J. Eq. 155, the vice-chancellor said that the court would extend its aid to the receiver of a foreign corporation for the purpose of enabling him to get possession of property which should in equity be applied in payment of its debts; that under the statute the court might appoint a receiver auxiliary to a proceeding instituted against a foreign corporation in the State which

created it, and might properly invest him with the same powers, so far as they were necessary to the collection and recovery of its assets, that it was authorized to grant to the receiver of a domestic corporation; and that it was bound, not only in virtue of the statute, but by the principles of a just comity, to extend to him the same remedies and rules of judgment in the recovery of the assets of the corporation that it would give to the receiver of a domestic corporation. See Bidlack v. Mason, 26 N. J. Eq. (11 C. E. Green) 230.

embarrassing duties, it is proper that on suitable occasions he should apply to the court for instructions. His rights become fixed upon his appointment, and the rights of creditors of the corporation represented by him then attach.¹ Money or estate in his hands is regarded as being in the custody of the law for those who eventually establish a right to it, though the court itself, in theory, has the care of the property for the benefit of the party or parties entitled to it.² Unless appointed under a special statute for a special purpose, he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court.³ A receiver is under no obligation to take forcible possession of the property without an express order of the court directing him to do so. When, however, the property is legally in his possession, it is the duty of the court to protect his possession, not only against acts of violence, but also against suits at law.⁴ In receiverships growing out of the bankruptcy or dissolution of corporations, the receiver may proceed to obtain possession of the books, papers, securities, and property, both real and personal, of the estate over which he is appointed. But the statutory powers conferred on such receivers do

¹ *In re Van Allen*, 37 Barb. 225. In New York, when a receiver is appointed, qualifies as such, enters upon, and continues in the discharge of his duties, he becomes, by the express terms of the statute, a trustee not only for the creditor by whose application he is appointed, but for all of the other creditors of the corporation. *Libby v. Rosekrans*, 55 Barb. 202.

² *Devendorf v. Dickinson*, 21 How. Pr. 275.

³ *Booth v. Clark*, 17 How. 322; *Corey v. Long*, 43 How. Pr. 492; 12 Abb. Pr. N. S. 427.

⁴ *Parker v. Browning*, 8 Paige Ch. 388. The possession of the receiver

being the possession of the court for the benefit of the parties to the suit, it may not be disturbed without the leave of the court. If any person claims a right paramount to the right of the receiver, he must, before he presumes to take any steps of his own motion, apply to the court for leave to assert his right against the receiver. This rule is not confined to property actually in the hands of the receiver. The court will not permit any one, without its sanction, to interrupt or prevent payment for property, which the receiver has been appointed to take. *Vermont, etc., R.R. Co. v. Vermont Cent. R.R. Co.*, 46 Vt. 792.

not enable them to obtain possession against persons resisting their authority, without the intervention of the court.¹ A court of equity will aid a receiver of a foreign corporation seeking to obtain possession of the corporate property from the officers of the corporation who are fraudulently withholding it; and to such a suit the corporation is not a necessary party. That the officers are in possession by purchase at an execution sale, will not prevent the court from examining into their conduct, when the case made leads to the conclusion that the suit in which the judgment was recovered was a contrivance designed to protect them in the possession of the property as against the receiver, creditors, and stockholders.² A corporation engaged in manufacturing an article under a patent, to which it had an exclusive right, continued to own such right up to the period of its dissolution and the appointment of a receiver, who was permitted by an order of the court to carry on the business. A person who had been the presiding officer of the corporation procured from the patentees their consent to his making and selling the article, for which he paid the same royalty which had been paid by the corporation. It was held that the right to manufacture and dispose of the article belonged exclusively to the receiver, and to the extent that another made use of it he was guilty of contempt.³

§ 366. Duty of receiver in relation to debts.—It is the duty of the receiver to call upon the stockholders to pay in full the balance due upon the shares held by them in the stock

¹ Iddings v. Bruen, 4 Sandf. Ch. 417.

² Bidlack v. Mason, 26 N. J. Eq. 230. A receiver must give notice of his appointment to the tenant of his judgment debtor before he can enforce the collection of the rent. Hunt v. Wolfe, 2 Daly, 298.

³ *In re Woven Tape Skirt Co.*, 12 Hun, 111. Persons who obstruct a receiver in carrying on the business of a railroad placed in his charge, are guilty of contempt, and liable to punishment therefor. *In re Doolittle and others*, Circuit Ct. E. D. Mo., 20 Cent. Law J. 269.

of the corporation at the time of his appointment when he has reason to believe that the whole amount due from those able to pay will be needed to discharge the corporate indebtedness, and for the expenses of executing the trust.¹ When the directors of an insolvent corporation fail to call for the full amount subscribed and payable, the court, on the application of creditors, will order payment to be made to a receiver, for the benefit of all of them, of so much of the unpaid subscription as will be sufficient to satisfy the claims of such creditors as may elect to come in under the decree.² The receiver will, of course, be controlled by the contract. Where the contract of subscription to stock was that twenty per cent. should be paid at certain specified dates, and the balance be subject to the call of the directors as they might be instructed at any regular meeting, it was held that, in the event of insolvency, the court, or the receiver acting by its decree, had no more authority to compel payment of the eighty per cent. unpaid on the shares than had the directors.³ The liability of members of a mutual insurance company upon their deposit notes cannot be increased by the fact that the company has become in-

¹ *Pentz v. Hawley*, 1 Barb. Ch. 122; *Chandler v. Brown*, 77 Ill. 333. See *Kennedy v. Gibson*, 8 Wall. 498; *Farnsworth v. Wood*, 91 N. Y. 308. A stockholder sued for the amount remaining due and unpaid on a subscription, cannot set up fraud in the appointment of the receiver, or that the corporation is not indebted. *Schoonover v. Hinckley*, 48 Iowa, 82.

² *Ward v. Griswoldville Manf. Co.*, 16 Conn. 593. In New Jersey, "the act respecting executions provides for the appointment of a receiver of the debtor's property, who is to apply it to the payment of a judgment creditor's debt and the costs of the proceedings and his own compensation, and then to

pay the balance, if any, into court. It gives a preference to the judgment creditor who invokes its aid. The act concerning corporations, on the other hand, provides for the payment of the creditors of an insolvent corporation out of its assets proportionally according to the amount of their debts, except mortgage and judgment creditors when the judgment has not been confessed to give preference. It provides against preferences. Both acts sequester the property of the debtor, the one for the benefit of the judgment creditor who takes the proceedings, the other for the benefit of all the creditors." *Conner v. Todd*, 48 N. J. 361.

³ *Chandler v. Keith*, 42 Iowa, 99.

solvent and its effects transferred to a receiver. The section of the statute of New York respecting the dissolution of corporations, which provides that if there is any sum remaining due upon any share of stock, the receiver shall immediately proceed to recover the same, does not authorize the receiver of an insolvent mutual insurance company to collect the whole amount of the deposit notes without an assessment; but for the payment of the several losses for which the company is liable, separate assessments should be made upon all of the notes in force at the time of each successive loss, in order to determine the extent of the liability on each note.¹ A bond and mortgage given to secure the payment of a sum due a corporation on a subscription to its shares may be collected by the receiver of the corporation though it has neglected or refused to issue scrip for the shares.² When a debt is unliquidated, the receiver is not justified in interposing unconscientious obstacles to the liquidation of the demand. He must act in good faith, and adopt all proper and prudent measures to put the claim in the way of liquidation before the period of distribution.³ It is the duty of a receiver to allow all claims against the corporation in behalf of persons representing that they are creditors which he becomes satisfied are justly due; but not any claim which could not have been recovered against the corporation.⁴ An order authorizing a receiver of a railroad company to pay the amounts due and maturing for materials and supplies used in operating the road, should be construed so as to restrict payments to demands for materials and supplies recently furnished, and not include claims accruing some time previous, especially when such claims have been changed

¹ Shaugnessy v. Rensselaer Ins. Co., See Liquidator, etc., v. Brown, 21 La. 21 Barb. 605; Williams v. Babcock, 25 Ann. 248.

² Id. 109; Bell v. Shibley, 33 Id. 610.

³ Matter of Van Allen, 37 Barb. 225.

² Battershall v. Davis, 31 Barb. 323.

⁴ Atty. Genl. v. Life, etc., Ins. Co., 4 Paige Ch. 224.

into promissory notes and the notes sold in the market and from time to time renewed.¹ A statute providing that when there are mortgages or other liens on the property of an insolvent corporation the legality of which is questioned, and the property likely to deteriorate in value pending the litigation, a court of equity may order the receiver to sell the same clear of incumbrances, being remedial in its nature, should be liberally construed.²

The receiver of an insolvent insurance company will not be allowed to reinsure the risks on unexpired policies. He can pay back to the holders of such policies so much of the premiums which have been paid as shall be in proportion to the period the policies have to run at the time they are cancelled, with the assent of the assured; but if the holder of a policy does not consent to that arrangement, he must take his chance for a ratable dividend with the other creditors in case of a loss. The receiver can allow the officers of the company the amount due them for their salaries up to the time of his appointment only, as debts to be paid ratably with other creditors. An officer against whom the receiver holds a note can, however, be credited the amount due him for his salary as an offset, to be applied in part payment of his note.³ Receivers of an insolvent corporation are not responsible for rent accruing on a lease made previous to their appointment, merely by accepting the trust and receiving the corporate assets. They may elect to take possession and assume liability to pay the rent according to the covenants of the lease if they deem it for the interest of the creditors to do so. But until such election, or the doing of some act which in law will be equivalent to an election, they are not liable.⁴

§ 367. Power of receiver to compromise claims.—A receiver

¹ *I Brown v. N. Y. & Erie R.R. Co.*, 19 How. Pr. 84.

² *Matter of Croton Ins. Co.*, 3 Barb. Ch. 642.

³ *Randolph v. Larned*, 27 N. J. Eq. 557.

⁴ *Com. v. Franklin Ins. Co.*, 115 Mass. 278.

is bound faithfully to collect and justly to disburse the assets constituting the trust fund. In doing this he is properly invested with discretionary power to compound and settle; but in the exercise of such power he must keep primarily and constantly in view the interests of those for whom he acts.¹ Upon a second appeal from the decision of receivers refusing to accept certain compromises offered by appellant, the chancellor said: "They have not considered it for the benefit of the trust fund to accept either of the propositions of the appellant. It would be a delicate matter for this court, under any circumstances, to direct the receivers to compromise a claim when in their opinion there could be no demand against them to affect the assets in their hands."²

A decree is objectionable which assumes to confer on a receiver a discretionary power to compromise with the stockholders in relation to the payment of the subscription. Each stockholder has a vested right in the contract of subscription of every other stockholder, and it is beyond the power of a court of equity to invest any person with a discretionary right to release it; at all events it cannot be done by a decree to which the stockholders are not parties.³

Although a statute provides that a receiver of an insolvent bank shall have power to make such compromises and settlements as he may deem most advantageous to the bank, yet his acts must be fair and just to creditors and to those concerned in the fund. Where judgment has been rendered for a debt due the bank, and property amply sufficient to pay it has been levied on, there is no room for compromise in the sense of abandoning part of the claim; and if such a compromise has been made by a receiver, an injunction will not be granted restraining his successor from selling the property levied on.⁴ A receiver has no power to waive any

¹ Suydam v. Receivers, 2 H.W. Green (3 N. J. Eq.) 114; *In re Croton Ins. Co.*, 3 Barb. Ch. 642.

² Suydam v. Receivers, *supra*.

³ Chandler v. Brown, 77 Ill. 333.

⁴ Morris v. Thomas, 17 Ill. 112. Under the New York statute the receiver is authorized to adjust and settle

legal defense to a claim against the corporation;¹ nor to dispense with the rules of law, and determine the case upon principles of equity.²

§ 368. Certificate of indebtedness.—A receiver's certificate has none of the elements of a promissory note, but is a mere acknowledgment that a debt is due the payee. There is no promise on the part of the signer to pay. The instrument is payable out of a specific fund, and does no more than show a claim on that fund. An assignor of a certificate of indebtedness issued by a receiver is not bound as a guarantor, the assignment of it not being an implied warranty that it will be paid.³

§ 369. Sale of corporate property by receiver.—A sale by a receiver under power delegated by a statute, is as effectual to convey the title as if the right of property were vested in him. In one case he would convey his own title; in the other, he conveys the title of the corporation. The sale is properly the act of the receiver under the power conferred, and not that of the corporation. The act of the receiver need not therefore be authenticated by the corporate seal. When a receiver of an insolvent corporation created abroad has been appointed to sell, convey, and assign all of the real and personal estate of the corporation, an assignment by such receiver of a debt due to the corporation from a resident here, has extraterritorial force, and may be enforced here against the debtor.⁴ A sale by a receiver of shares of

the claims of creditors by mutual agreement, by amicable reference, or by suits before the courts. Hence, his report to a referee will have a certain degree of authenticity, though it will not be conclusive upon the stockholders, at least in respect to any debts not adjusted by him in one of the above-mentioned methods. U. S. Trust Co. of N. Y. v. U. S. Fire Ins. Co., 18 N. Y. 199.

¹ *McEvers v. Lawrence*, Hoffman Ch. 172.

² *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen, 329; *Atty. Genl. v. Ins. Co.*, 4 Paige Ch. 224.

³ *McCurdy v. Bowes*, 88 Ind. 583.

⁴ *Hoyt v. Thompson*, 5 N. Y. 320. A statutory receiver has no power to lease a railroad of which he is in possession, unless authorized by the statute under which he is appointed, and no

stock held by an insolvent insurance company, the effects of which have been placed in his hands, is an executory contract, subject to the supervisory power of the court. The court can, in the exercise of a just discretion, sanction or disapprove of it, and the purchaser must be deemed to have purchased subject to this implied condition. If the receiver in making the sale acted under a misapprehension of facts, the purchaser acquires no fixed right to have the sale completed, it being more just that he should lose his bargain than that the trust estate should sustain the loss which might result from compelling the receiver to transfer the shares.¹ If a receiver improperly purchases property sold on an execution in favor of the property which he represents, the court will not declare the purchase void. The proper remedy is to hold the receiver responsible for the injury, if any, which the estate thereby sustains.²

§ 370. Suits by receiver.—Receivers have authority, by virtue of their general powers independently of statute, to sue for all moneys due to the corporation, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders.³ The receiver of an insolvent corporation may, in his character of trustee for the stockholders, maintain an action to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities improperly invested or misapplied.⁴ But he cannot maintain a suit to set aside as fraudulent a prior assignment or conveyance

ratification of such a lease would be valid except that of the legislature. State v. McMinnville, etc., R.R. Co., 6 Lea Tenn. 369.

¹ *In re Atty. Genl. v. Continental Life Ins. Co.*, 94 N. Y. 199.

² *Hobart v. Bennett*, 77 Me. 401.

³ *Osgood v. Laytin*, 5 Abb. Pr. N.

S. 1; 48 Barb. 463; *Osgood v. Maguire*, 61 N. Y. 524; *Brouwer v. Hill*, 1 Sandf. 629; *Gray v. Lewis*, 94 N. C. 392.

⁴ *Gillet v. Moody*, 3 Comst. 479; *Tallmage v. Pell*, 7 N. Y. (3 Seld.)

328; *Atty. Genl. v. Guardian, etc., Ins. Co.*, 77 N. Y. 272.

made by the debtor which is valid between the parties; nor to recover property so assigned as the property of the debtor, but not in his possession. His duty is confined to property of which the debtor has the possession and control, actually or constructively, in whole or in part.¹ Under a statute providing that he may sue in his own name or otherwise, and recover all of the estate, debts, and things in action belonging to or due to the corporation, he may bring trover for personal property unlawfully converted before his appointment.² When the note of a stockholder for the amount of his subscription has been given up illegally and in fraud of the creditors of the corporation, the receiver is the proper person to bring an action for the balance due on the note.³ At common law a receiver cannot maintain an action against a delinquent stockholder. It should be brought by a creditor against the corporation, making the stockholders co-defendants.⁴ In an action brought by a receiver to collect a balance alleged to be due on a contract to purchase shares of stock, which contract provides that the balance is subject to the call of the directors as they may be instructed by a majority of the stockholders represented at any regular meeting, there must

¹ Seymour v. Wilson, 16 Barb. 294. See Noble v. Halliday, 1 Comst. 330; Battle v. Davis, 66 N. C. 252.

² Gillet v. Fairchild, 4 Denio, 80.

³ Nathan v. Whitlock, 9 Paige Ch. 152.

⁴ Adler v. Milwaukee, etc., Co., 13 Wis. 57. See Stillman v. Dougherty, 44 Md. 380; Chandler v. Keith, 42 Iowa, 99; Pentz v. Hawley, 1 Barb. Ch. 122; Van Cott v. Van Brunt, 2 Abb. Pr. N. C. 283. The following case turned principally upon the construction of the statute of New York entitled "Of proceedings against corporations in equity." A creditor of a corporation who had obtained a judg-

ment at law and issued execution thereon, which was returned unsatisfied, filed a bill against the corporation, and, under the statute, a receiver was appointed who brought the present suit against a stockholder who had not paid his subscription in full, though he had paid all the regular calls made upon him. It was held that the receiver could not maintain the suit, but that when the creditor who filed the bill against the corporation found that the corporate property was not sufficient to pay the debts, he should have amended his bill and made the delinquent stockholders parties. Mann v. Pentz, 3 Comst. 415.

be a call or assessment, or something equivalent to it, in order to render the defendant liable.¹ Notwithstanding the dissolution of a corporation by a forfeiture of its franchises, the obligation of its contracts survives, and, upon the appointment of a receiver, the duty devolves upon him to call in the unpaid subscriptions to satisfy the outstanding debts. In such case, suits should be prosecuted in the name of the receiver, unless a sufficient reason is given why he ought not to do so.² An action may be maintained by the receiver of an insolvent bank against the directors for neglect of their official duties. If he refuses to bring an action, or is himself involved, a person aggrieved may sue.³ A suit may be brought by a receiver to set aside a mortgage given by a corporation on the ground that it is illegal and void.⁴ A receiver who is duly appointed may ordinarily sue in another State. This power, in the absence of special statute regulations, arises, when it exists, from comity, and it is in general subordinate to the right of local creditors as respects property within the jurisdiction where such suit is brought.⁵ In New York, the rule is well settled that re-

¹ Chandler v. Siddle, 3 Dillon, 477.

² Hightower v. Thornton, 8 Ga. 486.

In Louisiana, when a liquidator has been appointed by the legislature to liquidate the affairs of an insolvent corporation, he may be ordered to collect by suit or otherwise, as speedily as possible, for the benefit of the creditors, all of the assets he represents, including the subscriptions of the shareholders. New Orleans Gas Light Co. v. Haynes, 7 La. Ann. 114.

³ Ackerman v. Halsey, 37 N. J. Eq. 366. See Van Cott v. Van Brunt, *supra*. An action against one of the directors of a corporation for a statutory penalty alleged to have been incurred by him, is properly brought by the receiver in the name of the corporation, it being averred in the declaration that

the suit is brought by the direction of the receiver. Bank of Niagara v. Johnson, 8 Wend. 645.

⁴ Vail v. Hamilton, 20 Hun, 355.

⁵ Chandler v. Siddle, *supra*. See Booth v. Clark, 17 How. 322; Holmes v. Sherwood, 3 McCrary, 405; Wiswell v. Starr, 50 Me. 381. It was said, however, by the court in a recent case in Maryland, that the generally accepted doctrine in this country is that "the functions and powers of a receiver for the purpose of litigation are limited to the courts of the State within which he is appointed, and the principles of comity between nations and States which recognize the judicial decisions of one tribunal as conclusive in another, do not apply in such a case and will not warrant a receiver in

ceivers of foreign corporations may sue to recover property situated in that State, subject, however, to the qualification that the foreign law will not be recognized to the extent of divesting titles of citizens of New York fairly acquired.¹ A railroad company of Kentucky was a defaulting mortgagor, and, in a foreclosure suit against it, a receiver was appointed. Previous to the appointment of the receiver an unsecured creditor of the company, a citizen of Kentucky, commenced an action in the courts of Ohio against the company as a foreign corporation, and levied on certain cars of the company temporarily in Ohio which were covered by its mortgages. The receiver brought a suit to enjoin the attaching creditor from detaining or holding the cars. It was held that the conditions of the mortgages having been broken, the right to the possession of the property vested by the laws of Kentucky in the trustees named in the mortgages, and when the receiver was appointed the right of property passed to him for the benefit of the incumbrancers on whose motion he was appointed, and therefore as between them and the owner or the unsecured creditors the possession was that of the incumbrancers; that without the authority of the court no one, not even the trustees under the mortgages, could by execution or otherwise interfere with the receiver's possession; that had it appeared that an interest in the property was acquired by the seizure, and that the attaching creditor was a citizen of Ohio, the principle that the Ohio courts would protect its own citizens would have applied; but that, treating the mortgage as valid, no such interest existed or could be acquired by the levy of the attachment, the property being insufficient to pay the debts secured by the mortgages.²

It is incumbent on the receiver to show clearly a legal

bringing an action in a foreign jurisdiction." MILLER, J., in *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

¹ *Barclay v. Quicksilver Mining Co.*, 6 *Lansing*, 25.

² *Merchants' Bank v. McLeod*, 38 *Ohio St.* 174.

right to institute and carry on the suit. It is not sufficient for him to aver in the declaration that he was duly appointed. The time, and place, and every traversable fact, should be stated.¹ A receiver cannot maintain a suit under circumstances in which the corporation could not have maintained the same suit.² So any defense which might have been made by the defendant against the corporation may be made by him against the receiver.³

§ 371. Set-off against receiver.—The right of set-off is the same against the receiver that it would have been against the corporation.⁴ At the time of the appointment of a receiver of a bank, J. had to his credit on deposit \$924. The bank held a note of J., discounted by it, for \$391.43, which fell due three days after the receiver was appointed. It was held that this was a case of mutual credits, and that the receiver should make an application of a sufficient amount of the first-mentioned sum to J.'s credit in payment and satisfaction of the note.⁵ When an injunction against a bank is continued from time to time and ultimately made perpetual, it has the effect of sequestering and setting apart to the receiver the assets of the bank as they stood at the time of the first granting of the injunction. If a debtor of the bank has at that time bills of the bank, he can have them set off against his indebtedness; but not so with bills or other evidences of indebtedness which he has acquired since.⁶ Where a debt is due a bank from a firm, or from several persons jointly, and a credit belongs to one of the individuals, it cannot be said in any just sense that these are mutual debts or credits; nor will an assignment of a demand by a creditor of the bank so vest the title to such demand in the

¹ Gillet v. Fairchild, 4 Denio, 80; ceivers v. Paterson Gas Light Co., 3 Chandler v. Brown, 77 Ill. 333. Zab. N. J. 283.

² Savage v. Madbury, 19 N. Y. 32. ⁴ Jones v. Robinson, 26 Barb. 310.

³ Moise v. Chapman, 24 Ga. 249. ⁵ Colt v. Brown, 12 Gray, 233; Clarke v. Hawkins, 5 R. I. 219. See Cook v.

⁴ Berry v. Brett, 6 Bosw. 627; Re- Cole, 55 Iowa, 70.

assignee that he can set it off against his indebtedness to the bank ; the rights of the receiver and creditors becoming fixed at the time of the receiver's appointment.¹

§ 372. Liability of receiver for contempt.—A receiver may be adjudged guilty of contempt for refusing or neglecting to obey an order of the court requiring him to pay out of the property or proceeds he holds as receiver a specified sum.² When a railroad company is under restraint by the order of a State court of competent jurisdiction at the time receivers are appointed, the injunction is as binding on them as it would have been on the corporation, notwithstanding they may have been appointed by a United States court, and if they disregard the injunction they will be liable to punishment for contempt.³

§ 373. Suits against receiver.—When a corporation passes into the hands of a receiver it is taken by him subject to all of the debts and liabilities existing against it at the time of his appointment, whether arising from contract or tort. Hence an action may be maintained against him for a trespass committed before he took charge of the corporate effects, and if judgment is rendered against him in his capacity of receiver, it is leviable out of the assets of the corporation in his hands.⁴ A receiver may be held personally liable to persons sustaining loss or injury by or through his own neglect or misconduct ;⁵ but not for the neglect or misconduct of those employed by him in the discharge of his official duties. In the latter case, the action must be brought against him as receiver, and the judgment, if in favor of the plaintiff, be made payable out of the corporate funds.⁶ The receiver of a railroad company is not person-

¹ Matter of Van Allen, 37 Barb. 225.

See Sawyer v. Hoag, 17 Wall. 610.

² Clark v. Binninger, 11 Jones & Spencer (45 N. Y. Superior Ct.) 126, 344.

³ Safford v. People, 85 Ill. 558.

⁴ Combs v. Smith, 78 Mo. 32.

⁵ Turner v. Indianapolis, etc., R.R. Co., 8 Biss. 527.

⁶ Camp v. Barney, 4 Hun, 373 ; Davis v. Duncan, 19 Fed. Rep. 477. When a receiver appointed in a foreclosure suit

ally liable in damages for injuries incurred by an employé through the negligence of the employer in supplying inadequate tools and machinery, even though the injury was received on a line of railroad in another State which the receiver was operating under a lease. His acts are the acts of the corporations he represents, and, as they receive the benefit, upon them must rest the responsibility in the absence of any personal negligence on the part of the receiver.¹ But if a railroad is in the hands of a receiver, the company is not liable for accidents resulting from the

has been discharged and the property by order of the court turned over to the purchaser, unsatisfied claims against the receiver for torts committed by his subordinates, or on contracts made by him in his official capacity, are to be prosecuted and satisfied, if at all, by actions in the nature of proceedings *in rem* rather than *in personam*. An order granting leave to sue the receiver under such circumstances is error. Farmers' Loan, etc., Co. v. Central R.R. Co., 2 McCrary, 181. In an action against the defendant personally to recover damages for the alleged negligent killing of the plaintiff's testator on a railroad of which the defendant had been appointed special receiver, the court said: "The defendant was not individually the owner or possessed of the property of the road or of its earnings. The property was in the court for management and administration. The defendant was an officer of the court, obeying its orders and carrying out its directions, and there is no principle upon which a receiver or other officer of a court, merely obeying the orders of the court, having no interest in the prosecution of the work, and deriving no profits from it, should be held answerable except for his own acts and neglects." Cardot v. Barney, 63 N. Y. 281, distinguishing Blumenthal v. Brainard, 38

Vt. 402, and Paige v. Smith, 99 Mass. 395.

¹ Kain v. Smith, 11 Hun, 552, LEARNED, J., dissenting. Receivers cannot be held responsible for the covenants of the corporation over whose property they have been appointed to act by merely accepting the trust and receiving the assets, but become so solely by reason of their own acts. An insurance company took possession of certain premises leased to it by A. It afterward sublet the premises to B., and, as part of the transaction, took possession of other premises under a lease from B. Upon these leases to the company, payments became due on the first days of January and April, 1873. The company having passed into the hands of receivers in December, 1872, a proposition was made to them by B. in writing to take \$1,250 on January 1st, and a dividend as the rent due April 1st. The receivers accordingly paid B. on January 1st the foregoing sum by a check, which B. indorsed to A. It was held that this was not an election of the receivers to be held on the covenants of the lease from A., and that they were not liable for them, but that it was an election to accept the proposition of B. for a settlement. Com. v. Franklin Ins. Co., 115 Mass. 278.

negligence of employés who are under the control of the receiver.¹ When the court of a State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has no jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed, and in which the property in his possession is situated, based on his negligence or that of his servants in the discharge of their duty in respect to such property.² The mere fact that persons were acting as receivers under the appointment of a court of equity, will not be recognized as a defense to an action at law for the breach of an obligation or duty as common carriers which was fairly and voluntarily assumed by them.³ The proper mode of restraining a receiver when engaged in the discharge of his official trust, is by an application to the court for instructions, and not by making him a party to an action and obtaining an injunction against him.⁴

§ 374. Counsel fees.—As a general rule, the receiver is not allowed to employ the solicitors of either of the parties in the suit to assist him in the discharge of his duties;⁵ nor to deduct from the fund in his hands a counsel fee in a suit against him, if he is unsuccessful in his defense, nor a

¹ Ohio & Miss. R.R. Co. v. Davis, 23 Ind. 553; Turner v. Hannibal, etc., R.R. Co., 74 Mo. 602. A receiver is not liable for loss occasioned by his counsel's absconding. Powers v. Loughridge, 38 N. J. Eq. 396.

² Barton v. Barbour, 104 U. S. 126.

³ Blumenthal v. Brainerd, 38 Vt. 402; Newell v. Smith, 49 Id. 255;

Matter of Long Branch, etc., R.R. Co., 24 N. J. Eq. 398; Paige v. Smith, 99 Mass. 395; Meyer v. Johnston, 53 Ala. 237; Cowdrey v. Galveston, etc., R.R. Co., 93 U. S. 352.

⁴ Van Rensselaer v. Emery, 9 How. Pr. 135.

⁵ Ryckman v. Perkins, 5 Paige Ch. 543.

counsel fee in an appeal from the original suit when he is unsuccessful in such appeal.¹ The court has power to order counsel fees for services rendered in representative suits and proceedings to be paid by the receiver out of the trust funds in his hands.² Where a decree of court appointing a receiver of a railroad company stated, among other things, that he was to pay all claims existing on the pay-roll for services rendered, and for labor and supplies subsequent to a given time, it was held that services rendered by counsel might in some cases be said to come within the meaning of the term labor, and the court required counsel to specify the character of their services, in order that the receiver might distinctly understand and apply the principle to the various services performed by them.³

§ 375. Care of funds.—Funds which a person holds as receiver should be kept separate from his private funds. If mingled with his own, he may be charged with them as a borrower. By depositing the funds of the estate in a bank with his own, to his individual credit, he becomes a debtor of the estate, and if any loss ensue, he will be liable to make the loss good.⁴ A receiver should not invest funds in his hands without the direction or consent of the court. A statute which only authorizes him to collect and pay, confers upon him no power to invest. In the absence of any directions from the court, it is his duty simply to keep and protect the trust fund, and hold it ready for distribution.⁵ When it is necessary for him to employ an attorney in collecting a claim, and the attorney dies after having

¹ Utica Ins. Co. v. Lynch, 2 Barb. Ch. 573.

⁴ Matter of Stafford, 11 Barb. 353.

² Atty. Genl. v. Continental Life Ins. Co., 62 How. Pr. 130. See Hubbard v. Camperdown Mills, 1 Southeastern Reporter, 5.

⁵ Atty. Genl. v. North Am. Life Ins. Co., 89 N. Y. 94. See Lansing v. Lansing, 45 Barb. 182; 1 Abb. Pr. N. S. 280; Devendorf v. Dickenson, 21 How. Pr. 275; Iddings v. Bruen, 4 Sandf. Ch. 417.

³ Baylies v. Lafayette, etc., R.R. Co., 9 Bissell, 90.

appropriated to his own use a portion of the money collected, the receiver will not be held responsible, if the attorney whom he selected was in good standing, and there is nothing in the case to show any want of good faith or diligence on the part of the receiver.¹

§ 376. Disbursements by receiver.—While a receiver is entitled to sufficient clerical help for the proper discharge of his duties, such expenditures will only be sanctioned as are just and reasonable, and the court will pass upon each item. The cost of a daily newspaper for the office of a receiver of an insolvent bank was not allowed.² The receiver of an insolvent insurance company continued to occupy the offices of the company six months after his appointment. It was held that he should pay the rent of the premises during the time he was in possession of them out of the funds of the estate.³ A railroad was operated under a lease of another railroad in connection with its own line. Pending a foreclosure suit against the company, a receiver was appointed, who was instructed to adopt and confirm such leases as, in the exercise of a sound discretion, he should find advantageous to all of the parties. Having entered upon and used the leased railroad, he was held to have manifested his election to continue the lease, and to have thereby incurred liability for the payment of the rent for such time as he occupied the property demised. In such case, the source whence the funds in the hands of the receiver were derived would seem to be immaterial, or whether the particular portion of the road

¹ Matter of Union Bank of Jersey City, 37 N. J. Eq. 420.

² Ibid. A receiver will not be permitted to pay large sums to counsel without explanation. *In re Com. Fire Ins. Co.*, 32 Hun, 78.

³ People v. Universal Life Ins. Co., 30 Hun, 142. In this case, the court

below having referred the matter, the appellate court remarked that the practice in the settlement of insolvent companies of referring all claims, whether disputed or not, was unfair to the claimants, and made an improper expense for the estate.

covered by mortgages contributed more largely to the fund than other portions not subject to the liens. The receipts, from whatever source derived, were to form one common fund applicable in the first instance to the discharge of the obligations which the receiver was authorized to incur.¹ The funds in the hands of a receiver of a railroad company appointed in a suit to foreclose a mortgage given by the company must be applied to the satisfaction of the lien of the mortgage creditors, and not to the payment of the debts due to the general creditors, subject, however, to this modification: that the net earnings while the road is in his hands may be applied to the payment of claims having superior equities to that of the bondholders—such as outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, which may, under the circumstances of the particular case, appear to be reasonable. The court in the exercise of its discretion may impose terms in reference to the payment of certain claims. If no such order is made when the receiver is appointed, it may be done at any time during the progress of the cause, if required for the due administration of justice and the enforcement of the equities of the respective parties. When earnings of a railroad which ought in equity to have been used to pay current debts, have been applied by the company to the payment of interest due mortgage creditors, it is competent for the court to restore what has been thus improperly diverted, and to direct current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors. The doctrine of the restoration of the fund does not rest upon the ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are in a sense trustees of the earnings for the benefit of the different claimants, and

¹ Woodruff v. Erie R.R. Co., 93 N. Y. 609.

that if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of accounts, so employ the income in its hands as to restore the parties to their original rights.¹

In the seventh United States Judicial Circuit, the court has adopted the practice of requiring the receiver of a railroad, pending the foreclosure of mortgages, to pay certain claims for materials and supplies furnished and labor performed, not only when they accrued after the property came into his hands, but in some cases when they previously accrued. It is ordered in the exercise of the equitable discretion of the court in dealing with property which is of such a peculiar character; a railroad being a matter of public interest and concern. As to what shall be included in the claims to be paid, the practice has been to allow all which can be fairly regarded as a part of the operating expenses of the road, whether labor or supplies. As to the time within which such claims shall be allowed, the court has adopted by analogy the rule of the statute of the State in which the railroad is located in relation to liens on railroads for such claims.² With respect to claims against a receiver who was operating the railroad pending foreclosure, for loss and damages to property along the line of the road by fire alleged to have been set by sparks escaping from defective locomotives, it was held that where the fire occurred before the receiver was appointed the claim would not be allowed, it not being in any proper sense part of the operating expenses of the road.³

Statutory receivers are to some extent at least public agents of the State, and it is not bound by their acts which are not within the scope of their authority. When the

¹ Addison v. Lewis, 75 Va. 701; Miltenberger v. Logansport R.R. Co., 106 U. S. 286. See Carolina Bank, *ex parte*, 18 S. C. 289; Williams, *ex parte*, Ib. 299.

² Turner v. Indianapolis, etc., R.R. Co., 8 Biss. 315.

³ Hile's Case, 9 Biss. 49.

statute authorizes them to run the roads and pay the incidental expenses out of the earnings, all other modes of payment are thereby excluded, and they have no power to create debts and charge them on the road by a lien superior to that of a prior mortgage creditor. The parties from whom the receiver obtains his supplies will be presumed to be acquainted with the law, and to contract with him, knowing that the earnings of the road are their only means of payment, so that they are held to assume the risk of the adequacy and continuance of the earnings.¹

A receiver of a railroad company has no authority without the sanction of the court to make a contract which will bind the trust. While his duties and the discretion with which he is invested are different from those of a passive receiver appointed merely to collect and hold money due on prior transactions or rents accruing from houses and lands, all outlays made by him must either be authorized in advance or subsequently ratified by the court, and whatever is not so authorized or ratified, cannot be charged against the trust.² It is no part of a receiver's duty to interfere with the construction of a parallel line of railroad or to attempt to defeat any contemplated aid for such an enterprise by appropriating funds of which he has charge for that purpose. He is not authorized without the previous direction of the court to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use as contemplated by his appointment.³ He cannot bring an action of ejectment without leave of court,⁴ nor lay out money in repairs at pleasure. If he does the latter, before an allowance will be granted him, it will be referred to ascertain if the repairs are reasonable. It is his duty to keep regular accounts,

¹ State v. Edgefield, etc., R.R. Co.,
6 Lea Tenn. 353. ⁸ Cowdrey v. Galveston, etc., R.R. Co., 93 U. S. 352.

² Lehigh Coal, etc., Co. v. Cent. R.R. Co. of N. J., 35 N. J. Eq. 426. ⁴ Matter of Merritt, 16 Wend. 405; 5 Paige Ch. 125.

item by item, of expenses and of the receipts arising from all sources from which money may have come into his possession.¹

§ 377. Investigation of receiver's accounts.—The bondholders, stockholders, and creditors of a railroad company are entitled to an inspection of the books, papers, and accounts relating to the receivership for reasonable cause. The receiver should, however, neither be harassed by such applications, nor be subjected to purely inquisitive or "fishing" expeditions. When a charge is made against him, or there is reasonable ground shown for interference, the court should not hesitate to direct that an inspection be allowed. This refers to the books, accounts, and contracts of the receiver as contradistinguished from those of the corporation prior to his appointment.²

§ 378. Compensation of receiver.—However praiseworthy a receiver's conduct may have been, and however beneficial to the corporation, if he has done no more than the duty required of him, he will not be allowed extra compensation. But when it is clear that he has rendered service not contemplated in the original order of appointment, such as discharging the duties of another official, thus saving the payment of a salary or the services of an attorney, reasonable extra compensation will be granted him. The fact that he has furnished the corporation with supplies does not render such a transaction fraudulent *per se*, it not being presumed in the absence of proof that he knowingly and corruptly charged more for such supplies than they were worth, especially if it appears that he had nothing to do with fixing the price.³ A receiver of a firm was appointed in consequence of a disagreement in the management of its affairs. The New York Code provided that a receiver might be

¹ Hooper v. Winston, 24 Ill. 353.

² Fowler, *ex parte*, 9 Abb. N. C. 268. R.R. Co., 2 McCrary, 318.

³ Farmers' Loan, etc., Co. v. Central

allowed such commissions as should be fixed by the court, not exceeding five per cent. upon the amount received and disbursed by him. Although he had a right to take possession of and control the whole property, he failed to do so, and allowed the business to proceed the same it had previously done, and as was for the interest of all of the parties. It was held that under these circumstances it could not be claimed that he received or disbursed any of the funds either in fact or constructively.¹ If the receiver was indebted to the corporation when he was appointed, such indebtedness will be deducted from his compensation.²

In New York, although by statute the superintendent of insurance is to fix the compensation of the receiver of an insurance company, the receiver is nevertheless under the control of the court, and when, at the termination of his services, he presents his account, his compensation is to be determined by the court, unless some statute has fixed it or bestowed the authority elsewhere. The jurisdiction of the superintendent and the regularity of its exercise are both before the court. An order of the superintendent fixing the compensation before the services of the receiver have approached completion, and before commissions are earned, is premature, and if made before any one interested in the disposition of the assets has notice or an opportunity of being heard, it will not be permitted to stand. In the computation of commissions, the special fund deposited with the superintendent as security for registered policies and annuity bonds is treated as assets in the hands of the receiver, the statute providing that these securities are to be sold and converted into money and the proceeds paid over to the receiver. It is proper to deduct from the total of assets amounts paid as taxes upon lands sold on the foreclosure of mortgages.³

¹ *In re Woven Tape Skirt Co.*, 85 N. Y. 506.

² *Atty. Genl. v. North Am. Life Ins. Co.*, 89 N. Y. 94.

³ *Matter of Union Bank of Jersey City*, 37 N. J. Eq. 420.

CHAPTER XXIII.

PROCEEDINGS BY QUO WARRANTO.

§ 379. Definition and object.	§ 384. By whom prosecuted.
380. Information in the nature of <i>quo warranto</i> .	385. Who to be made parties defendants.
381. When the proceeding may be maintained.	386. Essential averments in informa- tion.
382. Leave to file information, in dis- cretion of court.	387. Appearance of defendant.
383. When an information will not lie.	388. Defense.
	389. Judgment.

§ 379. Definition and object.—A writ of *quo warranto* is a demand made by the sovereign upon an individual to show by what right he exercises a franchise appertaining to the former, which, according to the constitution and laws of the land, he cannot legally exercise except by virtue of a grant or authority from the sovereign. Unless the defendant in his answer disclaims all right to the franchise in question, and denies that he has assumed its exercise, he must show such facts as, if true, completely invest him with the legal title to it; otherwise, the law considers him a usurper, and denounces judgment against him.¹ The king being, by the feudal law, the head and representative of the community, was considered not only as the ultimate proprietor of all the land in the kingdom, but the fountain

¹ State v. Harris, 3 Ark. 570. Blackstone says: "A writ of *quo warranto* is in the nature of a writ of right, for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-

user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse." 3 Blk. Com. 262.

from whence all public franchises were derived. When, therefore, any such franchise was exercised without legal authority, it was regarded as an usurpation on the king's prerogative; and if a franchise had been legally granted, but was exercised in a manner inconsistent with the express or implied condition of the grant, the latter was considered as forfeited to the king. The manner by which either the original title to franchises was tried, or the forfeiture of them for subsequent misapplication was enforced, was by writ of *quo warranto*, or king's writ of right for franchises and liberties. This was an original writ issuing out of chancery, directed to the sheriff of the county, commanding him to summon the defendant to be at such a place before the king at his next coming into the county, or before the justices itinerant at the next assize, "when they should come into those parts," to show by what warrant, "*quo warranto*," he claimed the franchises mentioned in the writ.¹ The common law regarded the proceeding by writ of *quo warranto* as the most appropriate remedy for the king, by which he might at pleasure require any subject exercising a public franchise or authority which he could not legally exercise without a grant from the crown, to show by what warrant he exercised it, and thereupon to demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise.

"In times of feudal barbarity which accompanied and followed for many years the overgrown power of the nobles, there was constant occasion to apply the corrective of the *quo warranto*. It was the only effectual remedy, even if it could be called a remedy in itself; for monopolies had become so numerous, and so fortified by interest and power, that the application of the writ depended in a greater measure on the personal character of the prince, than moral

¹ 2 Kyd on Corp. 395.

submission to the law. This was especially so when the writ was brought to bear upon manorial claims residing in the hands of the barons or lords either temporal or spiritual. Looking at Keilwey's reports of cases in Eyre in the time of the very memorable king Richard the Third, fols. 137 to 152, one would be led to believe that a good deal of his reign was devoted to this sort of judicial contest with his nobles."¹

In this country, as in England, the object and effect of the proceeding must be either to oust the defendant from the franchise if he fails to show in himself a complete legal

¹ COWEN, J., in *People v. Bristol, etc.*, Turnp. Co., 23 Wend. 222. As king Edward the First needed money, "it was suggested by some of his counsellors that few of the nobility, clergy, or commonalty who had franchises by the grant of his progenitors, could produce the charters in support of the claim, as most of those had by length of time, or from the tumult and confusion of the civil wars in the time of Henry the Third, or by accident, been either lost or destroyed. In consequence of this counsel, the king issued a proclamation commanding every man who had liberties or franchises to appear before certain persons, commissioned for that purpose, to show by what title he claimed them; on which, many franchises which had long been quietly enjoyed were taken into the king's hands. This produced much discontent throughout the kingdom." 2 Kyd on Corp. 397. "In former times, it was rather a common occurrence for proceedings to be instituted by the crown against corporations for misusing their franchises, or against individuals for usurping such privileges. State reasons were generally the motive cause. The municipal corporations during the middle ages, and till a period at least as late as the revolution of 1688, formed

one of the chief mainstays of English liberty. The sovereigns encouraged them as the centres of trade, and repressed them by every means when they attempted to make subservient to political objects the great power which the union and periodical meetings of their members gave them. Other incentives there were too which prompted the almost continual interference of the crown with the corporations. Every addition to the importance and strength of them was assumed to be an encroachment upon, and a diminution of, the prerogative. Moreover, the fines imposed upon corporate bodies, and often upon the luckless corporators themselves, were a lucrative source of revenue. However, with the increase of individual freedom and protection for the expression of individual opinions, the political importance of these bodies has greatly diminished; consequently, seldom, if ever, does the crown now attack them for an encroachment upon its own privileges, or for any other reason of offence to itself. When the crown does intervene, it is rather the State than the sovereign personally; the cause is detriment, actual or apprehended, to the public interests." Green's Brice's Ultra Vires, 2d Am. Ed. 788, 789.

right to its exercise derived from or under the authority of the State, or, if the franchise has been once legally granted and has been forfeited by the defendant, or by those through whom he derives title to it, to seize it into the hands of the State. But the writ is never issued in order to restrict or prevent any one legally possessed of a public office or franchise from exercising any right, authority, or privilege incident to it. It is a legal proceeding for the purpose of investigating and determining by judicial authority the legal right to a public office or franchise, and was never intended by the common law to be used as the legal instrument or means of prohibiting or restraining a public officer or person exercising a public franchise from the doing of any particular act or thing the right of doing which was claimed by virtue of such office or franchise, and constituted a portion only, or an integral part, of the rights, powers, and privileges incident thereto.¹

§ 380. Information in the nature of quo warranto.—In England, after the circuits of the justices itinerant ceased, the writ of *quo warranto* gradually went out of use, and an information in the nature of *quo warranto* at the suit of the attorney-general was substituted in its place.² Blackstone says that the discontinuance of the original process was probably occasioned by its length, and the fact that the judgment was final and conclusive even against the crown.³ An information in the nature of a *quo warranto* which has superseded the old writ, is defined to be a criminal method

¹ State v. Evans, 3 Ark. 585. Although it is the appropriate legal proceeding to oust or remove from office by judicial authority a person who is ineligible to the office of judge, or who has not been legally elected, appointed, commissioned, or qualified to hold such office, yet if the office be held by a person eligible thereto, who has been legally elected or appointed and qualified to

hold it, he cannot by such proceeding be legally prohibited or prevented from taking cognizance of and adjudicating any suit or proceeding in a court which he is authorized by law to hold, although such court has not jurisdiction of the matter. Ib., per RINGO, C. J.

² 2 Kyd on Corp. 403.

³ 3 Blk. Com. 263.

of prosecution as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him.¹ In Wisconsin and Florida, the terms *quo warranto*, and information in the nature of a *quo warranto*, are used as synony-

¹ The statute of 9 Anne, ch. 20, after reciting that "divers persons had of late illegally intruded themselves into and taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales; and where such offices were annual offices it had been found very difficult, if not impracticable, by the laws then in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year, and, where such offices were not annual offices, it had been found difficult to try and determine the right of such persons to such offices before they had done divers acts in their said offices prejudicial to the peace, order, and good government, within such cities, towns corporate, boroughs, and places in which they had respectively acted," provided that "for the future, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful for the proper officer in each of the respective courts of king's bench, sessions of counties palatine, and great sessions of Wales, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or fran-

chises, and to proceed in such manner as is usual in cases of information in the nature of *quo warranto*; and if it shall appear to the said respective courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of *quo warranto* shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary notwithstanding. And in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said courts shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said franchises, it shall and may be lawful for the said courts respectively as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises, as to fine such

mous and convertible, the object and end of each being substantially the same.¹ A different interpretation was, however, given to a like clause in the constitutions of Arkansas and Missouri.² Although the information in its origin was regarded as a criminal prosecution, it has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only.³ In *Respublica v. Wray*,⁴ upon a suggestion that a county treasurer procured his appointment by improper practices, the attorney-general obtained a rule to show cause why an information in the nature of a *quo warranto* should not be filed against him. *SHIPPEN*, J., said: "The present is the first instance that we recollect of an application of this kind in Pennsylvania; and, on the opening of the case, it struck us to

person or persons respectively for his or their usurping, intruding into, or unlawfully holding and executing, any of the said offices or franchises; and also it shall and may be lawful for the said courts respectively to give judgment that the relator or relators in such information named shall recover his or their costs of prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators."

¹ *State v. West Wisconsin R.R. Co.*, 34 Wis. 197; *State v. Gleason*, 12 Fla. 190.

² *State v. Ashley*, 1 Ark. 279, 513; *State v. Real Estate Bank*, 5 Id. 595; *State v. Johnson*, 26 Id. 281; *State v. St. Louis Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Id. 555.

³ *People v. Utica Ins. Co.*, 15 Johns. 358; *Commercial Bank v. State*, 4 Sm. & Marsh, 439, 504; *Bank of Vincennes v. State*, 1 Blackf. 267; *Donnelly v. People*, 11 Ill. 552; *Ensminger v. Peo-*

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ple, 47 Id. 384; *Lindsey v. Atty. Genl.*, 33 Miss. 508; *State v. Smith*, 48 Vt. 266; *People v. Alb. & Susq. R.R. Co.*, 57 N. Y. 161; *s. c. i Lansing*, 308; 5 Id. 25.

⁴ 3 Dallas 490, March Term, 1799. In *Atty. Genl. v. Delaware, etc., R.R. Co.*, 38 N. J. 282, a similar objection to the proceeding having been suggested, the court said: "The old writ of *quo warranto* was clearly of a criminal nature, and the information which for centuries has served as its substitute partook of the same character. The punishment inflicted under it was often of substantial consequence. But even in Blackstone's time, it had long been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only, and it was then usually considered as merely a civil proceeding. After verdict for the defendant in such informations, a new trial may be granted." See *Rex v. Francis*, 2 Term Rep. 484; 3 Blk. Com. 263; 4 Id. 312.

be within the 10th section of the 9th article of the constitution, which declares that no person shall for any indictable offence be proceeded against criminally by information except in cases that are not involved in the present motion. But, on consideration, it is evident that the constitution refers to informations as a form of prosecution to punish an offender without the intervention of a grand jury; whereas, an information in the nature of a writ of *quo warranto* is applied to the mere purposes of trying a civil right, and ousting the wrongful possessor of an office." When there are certain immunities and privileges in which the public has an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, such immunities and privileges must be franchises. If in England a privilege in the hands of a subject which the king alone can grant would be a franchise, with us, a privilege or immunity of a public nature which cannot legally be exercised without a legislative grant, would also be a franchise. An information need not show a title in the people to have the particular franchise exercised, but calls on the intruder to show by what authority he claims it; and if the title set up be incomplete the people are entitled to judgment.¹

The New York Code has abolished the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, and enacted that the remedy previously obtainable in those forms may be obtained by an action.² In Tennessee, the writ of *quo warranto* is unknown in practice.³ By the Code of that State⁴ an action lies in the name of the State whenever any person unlawfully holds

¹ People v. Utica Ins. Co., *supra*.

² N. Y. Code, Ed. of 1884, sec. 1983; People v. Cook, 8 N. Y. (4 Selden) 67.

Although an information in the nature of *quo warranto* in New York partook of the character of criminal proceedings by reason of the judgment being in

some cases followed by a fine, yet it was classed with civil remedies in the revised statutes.

³ Lowry v. Turk, Mart. & Yerg. 287; Atty. Genl. v. Leaf, 9 Humph. 753.

⁴ Code of Tenn., sec. 3409, *et seq.*

or exercises any public office or franchise within the State. The suit is brought by bill in equity filed either in the circuit or chancery court of the county or district, and it may be brought by the district attorney when directed to do so by the general assembly, or by the governor and attorney-general of the State; or it may be brought on the information of any person upon his giving security for costs.¹ In Colorado the provision of the revised statutes authorizing proceedings by information in the nature of *quo warranto* has been repealed, and, under the Code, the proceeding is now by civil complaint and summons.²

§ 381. When the proceeding may be maintained.—An information can be supported in all cases where the ancient writ itself could have been, the object being by the change of practice merely to simplify and render more efficient the remedy, and not to extend it to new or different objects.³ Every private corporation, in accepting its charter, impliedly undertakes and agrees, upon condition of forfeiture, that it will exercise the rights and privileges conferred upon it in furtherance of the objects and purposes of its creation and not otherwise, and that it will so conduct its affairs that it shall not become dangerous to the safety or well-being of the State or community in and with which it transacts business.⁴ In *Terret v. Taylor*⁵ the court said that “a private corporation created by the legislature may lose its franchises by a misuser or nonuser of them; and they may be re-

¹ *Hyde v. Trehwitt*, 7 Coldw. 59. The validity of an election contested under the Code, cannot be tried by this form of proceeding. *Ib.*

² *Central, etc., Road Co. v. People*, 5 Col. 39; *Atchinson, etc., R.R. Co. v. People*, *Ib.* 60. “Whatever may be the form of the action prescribed by the general assembly, whether by information in the nature of *quo warranto*, or by the ancient writ of *quo warranto*, or by complaint in a civil action, the ob-

jects to be attained are identical, and the proceeding is in substance civil, and instituted for the determination of purely civil rights.” *Ib.*, per *THACHER*, C. J.

³ *Lindsey v. Atty. Genl.*, 33 Miss. 508.

⁴ *Ward v. Farwell*, 97 Ill. 593; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Sinking Fund Cases*, 99 Id. 700.

⁵ 9 *Cranch*, 43.

sumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." When a corporation fails to do that which it must be seen it was intended and expected it would do, or does that which it is certain it was intended and expected it would not do, such acts or omissions concern matters which are of the essence of the contract between the State and the corporation ; and although the State may not declare that non-performance shall constitute a forfeiture, yet by no latitude of equitable interpretation can it be regarded as a hard bargain, and as such relieved against in a court of law ; but it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the contract.¹ An information in

¹ Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. N. C. 456, per RUFFIN, C. J. In England, franchises at an early day were very numerous, "and those who held them were constantly seeking their enlargement, a state of things which called for the exertion of great and continued vigilance by the attorney-general and other officers of the crown in preventing their abuse. They were under the special surveillance of the justices in Eyre, and a practice seems to have prevailed of passing and having them allowed by those justices as they perambulated the kingdom. The mere fact of not coming in, and promptly showing claim, whenever the attorney-general chose to send out a writ of *quo warranto*, was a very common cause of forfeiture. Very strict rules prevailed as to the manner in which the franchises were to be exercised ; and, considering the nature of some of them, it was necessary that it should be so. Some were to hold courts, have a bailiwick where process exclusively ran, and

have gaols for the keeping of prisoners. When the courts became dilatory or corrupt, when bailiffs became negligent, or oppression was practiced against prisoners—in short, whenever a greedy irregularity or excess exhibited itself in pursuing any of the numerous objects of such gainful monopolies or acts of carelessness and negligence indicated a settled indifference to them, they were held forfeited to the crown, the first being imputed as an abuse, the last as a sort of lapse. In times of feudal barbarity which accompanied and followed for many years the overgrown power of the nobles, there was constant occasion to apply the corrective of the *quo warranto*. It was the only effectual remedy, even if it could be called a remedy in itself; for monopolies had become so numerous and so fortified by interest and power, that the application of the writ depended in a greater measure on the personal character of the prince, than moral submission to the law."

the nature of *quo warranto* is the appropriate remedy for non-feasance, or malfeasance, abuse of power, or misuse of privilege by a corporation;¹ or where a body assumes to act as a corporation without legal authority.² Although it is not

¹ Reed v. Cumberland, etc., Canal Corp., 65 Me. 132; People v. Thompson, 21 Wend. 235.

² People v. Kingston, etc., Turnp. Co., 23 Wend. 193; Parish of Bellport v. Tooker, 29 Barb. 256; 21 N. Y. 267; State v. Moore, 19 Ala. 514; Turnpike Co. v. State, 3 Wall. 210; People v. Utica Ins. Co., 15 Johns. 358; 8 Am. Decis. 243. An information in equity by the attorney-general on behalf of the State cannot be maintained against a private trading corporation the proceedings of which are not shown to have injured or endangered any public or private rights, and are objected to solely on the ground that they are not authorized by its act of incorporation and are therefore against public policy. In Atty. Genl. v. Utica Ins. Co., 2 Johns. Ch. 371, Chancellor KENT held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law by information in the nature of *quo warranto*. Such an information was thereupon filed and sustained by the Supreme Court, and judgment rendered thereon that the corporation be ousted from the franchise it had usurped. People v. Utica Ins. Co., 15 Johns. 358. See Boston, etc., R.R. Co. v. Midland R.R. Co., 1 Gray, 340; Goddard v. Smithett, 3 Id. 16; Atty. Genl. v. Salem, 103 Mass. 138; Genl. Sts. of Mass., ch. 145, secs. 16, 24. It was said in Massachusetts in a late case that the only instances in which informations in equity in the name of the attorney-general had been sustained in

that State, were of two classes. That the one was of public nuisances which affected or endangered the public safety or convenience, and required immediate judicial interposition, like obstructions of highways or navigable waters; and that the other was of trusts for charitable purposes, where the beneficiaries were so numerous and indefinite that the breach of trust could not be effectively redressed except by suit in behalf of the public. Atty. Genl. v. Tudor Ice Co., 104 Mass. 239, and cases cited, per GRAY, J. The only adequate remedy to adjudge an office vacant and to compel the admission of a person properly elected, is at law. The judgment of a court of equity would not oust the directors or cause a vacancy, if the office were *de facto* filled. Owen v. Whitaker, 20 N. J. Eq. (5 C. E. Green) 122. In Van Dyke v. Hart, 4 Halst. N. J. Ch. 344, the court restrained directors, who appeared to be illegally elected, from proceeding to erect works of the company which would affect its future success; but it did not adjudge their offices vacant, or give any relief in relation to that matter. In Mickles v. Rochester City Bank, 11 Paige Ch. 124, Chancellor WALWORTH said: "The question as to the validity of the election does not appear to be a proper subject of equitable cognizance. The legislature has provided a summary remedy by an application to the Supreme Court to set aside the election of these directors if it is illegal. That court, therefore, is the proper tribunal to set aside the election, if it has not been made in conformity to law."

every accidental omission of a duty, or accidental commission of an error, that will be cause of forfeiture, yet this is very different from a deliberate abandonment of a salutary rule prescribed by the charter, and the substitution of another rule for the transaction of business, where it is manifest that the substituted rule will, if continued, defeat one of the primary objects of the legislature in granting the charter.¹

A cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than in a direct proceeding for that purpose against the corporation, which the government creating the corporation can alone institute, and a forfeiture may be waived either expressly, or by legislative acts recognizing the continued existence of the corporation.² As said by the court in an early case in New York, though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges

¹ State v. Commercial Bank of Manchester, 33 Miss. 474. See State v. Cent. Ohio Mut. Relief Assoc., 29 Ohio St. 399; State v. Standard Life Assoc., 38 Id. 281; State v. Railway Co., 40 Id. 504. The cases in which the Circuit Courts of the United States have jurisdiction under section 2010 of the United States revised statutes are those in which it appears that the sole question touching the title to office arises out of the denial of the right to vote to citizens who offered to do so, on account of race, color, or previous condition of servitude, such right being guaranteed by the fifteenth article of the amendment to the Constitution of the United States. The statute gives no jurisdiction over a cause merely to enable a party to physically retain or regain an office to which he had a title estab-

lished by an election, and from which he has subsequently been ejected. Johnson v. Jumel, 3 Woods, 69.

² Matter of N. Y. Elevated R.R. Co., 70 N. Y. 327; Centr. Crosstown R.R. Co. v. Twenty-third St. R.R. Co., 54 How. Pr. 168; Gaylord v. Fort Wayne, etc., R.R. Co., 6 Biss. 286; N. J. Southern R.R. Co. v. Long Branch Commrs., 39 N. J. 28; Importing, etc., Co. v. Locke, 50 Ala. 332; West v. Carolina Life Ins. Co., 31 Ark. 476; Dyer v. Walker, 48 Pa. St. 157; Moore v. Schoppert, 22 W. Va. 282; Mosely v. Burrow, 52 Texas, 396; Montgomery v. Merrill, 18 Mich. 343; Curien v. Santini, 16 La. Ann. 27; Hodgson v. Cope-land, 16 Me. 314; Rollins v. Clay, 33 Id. 132; Proprs. of Baptist Meeting House v. Webb, 66 Id. 398; Bache v. Horticultural Soc., 10 Lea Tenn. 436.

are conferred and the conditions enjoined upon them ; they obtain the grant and engage to perform the conditions ; and when charged with a breach there is no reason why they should not be held accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent. If a feoffment be made of lands upon condition of paying rent, building a house, or planting an orchard, and a failure to perform, the feoffer may enter. So if an office be granted, a condition is implied that the party shall faithfully execute it, and for neglect the grantor may discharge him. Placing corporate grants upon this footing, makes it easy to ascertain the principles that should govern conditions annexed to them. The analogous cases of individual conditional grants gives the rule.¹

A corporation may be dissolved in a proceeding by *quo warranto* for the violation of the charter, although the latter provides that the corporation shall not be dissolved before the period for which it was incorporated until its debts are paid ; the latter clause being intended merely to prevent the corporation from dissolving itself before the time mentioned.² A remedy reserved to the legislature to repeal the charter of a bank is cumulative, and if not enforced, the right to proceed by *quo warranto* is unimpaired.³ The legality of the organization of a school district may be inquired into by an information in the nature of *quo war-*

¹ People v. Kingston, etc., Turnp. Co., 23 Wend. 193. A reasonable and substantial performance according to the intent of the grantor is required. Ib. The power to judge as to what is necessary or reasonable in the premises is, in the absence of an express provision of law on the subject, in the first instance in the corporation. Com. v. Fitchburg R.R. Co., 12 Gray, 180. But whether or not a corporation which

has misused or abused its franchises shall be ousted is in the discretion of the court. State v. People's Mut. Benefit Assoc., 42 Ohio St. 579. Neglect of a corporation to hold its annual meetings does not operate to dissolve it. State v. Barron, 58 N. H. 370; 57 Id. 498.

² State Bank v. State, 1 Blackf. 267.

³ Grand Gulf R.R. etc., Co. v. State, 10 Sm. & Marsh, 428.

*ranto.*¹ The ancient proceeding to try and determine the right and title to all offices and franchises was, as we have seen, by the writ of *quo warranto*; and where a legal question was involved, that was the only mode of determining it. The applicant first established his title to the office, and then the possession of the books and papers was enforced, as a matter of course. By the statute of Mississippi, regulating informations in the nature of *quo warranto*, the old remedy is not only preserved, but rendered more expeditious and convenient; and it is declared the appropriate proceeding to try the right to any office in the State.² It was held in Wisconsin that an alleged unlawful intrusion into or usurpation of the office of governor, might be tried in the Supreme Court by information in the nature of *quo warranto*, and the defendant ousted.³ The appointment by the mayor of a city of inspectors of a prison in a clandestine and improper manner, will be ground for an information in the nature of *quo warranto* against the inspectors so appointed.⁴ It is the proper remedy in the

¹ State v. Independent School Dist., 29 Iowa, 264. In Illinois, it is provided by statute that an information in the nature of *quo warranto* may be maintained where any association or number of persons act within the State as a corporation without being legally incorporated. The question as to the legal existence of a school district can be determined under this statute. Renwick v. Hall, 84 Ill. 162.

² Newsom v. Cocke, 44 Miss. 352. See Hyde v. State, 52 Id. 655. In Illinois, prior to the act of 1881, a *quo warranto* did not lie in cases other than those for the usurpation of some franchise, or intrusion into a public office, or an office in a corporation created by the State. By the act of 1881, the writ was extended to cases where any person should hold, or claim to hold or exercise, any "privilege, ex-

emption, or license" which had been improperly, or without warrant of law, issued or granted by any board, commission, court, or other person or persons authorized or empowered by law to grant or issue such privilege, exemption, or license. Swarth v. People, 109 Ill. 621. In Vermont, the right of the Supreme Court to issue a writ of *quo warranto* is recognized in general terms by the statutes of the State. The occasions are left to be determined by the common law rules by which the writ is the appropriate mode in which to try an alleged usurpation of offices or franchises inconsistent with the State sovereignty. State v. Boston, etc., R.R. Co., 25 Vt. 433.

³ Atty. Genl. v. Barstow, 4 Wis. 567. See State v. Gleason, 12 Fla. 190.

⁴ Com. v. Douglass, 1 Binney, 77.

first instance, when an office is already filled by a person who has been admitted and sworn, and is in by color of right.¹ On such a proceeding against village trustees who neglected to give notice of an election of new trustees, and continued to hold over beyond the term for which they were elected, it was held that they would be ousted from office, although the statute provided that they should hold until an election, and new trustees had taken the oath.² In Pennsylvania, *quo warranto* is the specific statutory remedy which ousts the equitable jurisdiction of the case when borough officers enter upon official duties under an alleged illegal appointment of the town council.³ The legality of the election of trustees of a cemetery association, and their right to exercise the powers and conduct the affairs of the association, cannot be judicially tested by a bill in equity, but falls within the jurisdiction of proceedings at law by *quo warranto*.⁴ Upon a proceeding by *quo warranto*, the suggestion set forth the charter of a church ; that, at the regular annual election for the members of the board of trustees of the congregation, the relators were elected as a board of trustees, and had been recognized by the session of the congregation as in full communion with the church ; that the defendants had, notwithstanding, used and still did use the franchise, offices, privileges, and liberties of the board of trustees of the congregation, and had usurped, and did usurp upon the commonwealth therein, to the great damage of its constitution and laws ; wherefore, the relators prayed process of law against the defendants to answer by what warrant they claimed to have, use, and enjoy the franchises, offices, privileges, and liberties aforesaid. It was held that the Supreme Court of Penn-

¹ People v. Corp. of New York, 3 Johns. Cas. 79; People v. Tibbets, 4 Cowen, 358; State v. Buchanan, Wright, Ohio, 233; St. Louis County Court v. Sparks, 10 Mo. 117.

² People v. Bartlett, 6 Wend. 422. See Com. v. Meeser, 44 Pa. St. 341. ³ Updegraff v. Crans, 47 Pa. St. 103. ⁴ Hullman v. Honcomp, 5 Ohio St. 237.

sylvania had jurisdiction, and that it was a proper case for the issuing of a writ of *quo warranto*, as settled by the uniform course of decision and practice for more than half a century.¹ The appointment of professors of an incorporated college is a franchise, and the assertion of such right, unless justified by authority from the legislature, is an usurpation for which an information in the nature of *quo warranto* is appropriate; no individual in particular being aggrieved, but the public at large being affected.²

It was held in New York that an action in the nature of *quo warranto* was the proper remedy to bring up for decision the question of the right of the defendant to discharge the duties of supervisor of a town where the complaint alleged that no such town existed, and that the acts of the defendant were without legal authority. It was contended that if there was no such town, there could be no supervisor of it, and that consequently the defendant did not in fact usurp the duties of any office. It was held, however, that this objection was too technical, the court remarking that the object of the framers of the Code in the provisions in reference to these actions was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office in the State; that such a determination would necessarily involve that of the existence of the particular office; that if the office the duties of which were usurped and unlawfully exercised had no legal existence, it would follow that no usurpation was established, and the same result would follow if it should be ascertained that the office legally existed, and

¹ Com. v. Graham, 64 Pa. St. 339.

² People v. Trustees of Geneva College, 5 Wend. 211. Section 430 of the New York Code of Procedure, makes it the duty of the attorney-general, "on leave granted by the Supreme Court, or a judge thereof," to bring an action for the purpose of vacating the charter

or annulling the existence of a corporation, other than municipal, which, by the deliberate and fraudulent action of its officers and trustees, has wasted and misappropriated its entire capital. People v. Globe Mut. Life Ins. Co., 60 How. Pr. 82.

the party claiming to exercise its duties was lawfully entitled so to do ; that in either aspect, the determination of the legal existence of the office was involved, and must necessarily be decided ; that these views received the sanction of the court in *People v. Draper*,¹ which was an action to test the right of the defendants to the office of police commissioners under an act of the legislature to establish a metropolitan police district ; that their right to discharge the duties of the office depended on the question whether or not such an office had a legal existence ; and that the question was settled by determining the constitutionality of the act creating the office.²

The right to a military office may be tried by *quo warranto*. It is involved in the very nature of a State that the government instituted by it is supreme as to the offices, authorities, and instrumentalities by which it performs its functions. It must supervise them all, and their legitimacy depend upon its recognition of them. This is made emphatically the case in relation to military offices and jurisdictions by the clause in the constitution that the military shall be subordinate to the civil power. The former is not a department of the government, but only an instrument by which the will of the government may be executed in a portion of its duties. A military officer cannot have authority

¹ 15 N. Y. 532.

² *People v. Carpenter*, 24 N. Y. 86; *S. P. State v. Coffee*, 59 Mo. 59. In *People v. Maynard*, 15 Mich. 463, a *quo warranto* questioned the right of a person to act as treasurer of a county. He claimed that by the formation of a new county the residence of the treasurer of the original county being embraced in the new county, the office had become vacant and that he was appointed treasurer to fill the vacancy. It was held that the law which purported to create the new county was unconsti-

tutional, that therefore the office of treasurer had not become vacant, and hence, the defendant not having been legally appointed, did not hold the office or have any title to it. Although the solution of the question whether the defendant was legally treasurer depended upon the validity of the law intended to create the new county, yet the proceeding was instituted solely to try the question whether he was an officer, and not whether his official acts should be confined to a particular locality.

that is not given by the civil law, or sanctioned by military customs which are recognized as law by the civil authorities. An office being a right to some public employment, the usurpation of it is to be remedied by that department of the government which has the general jurisdiction of disputed rights.¹

When the ground alleged is intruding into an office, the court will not deny the application merely because the office is annual;² and where the statute under which the information is filed provides for the imposition of a fine in the discretion of the court, and the payment of costs by the respondent should he be found guilty of the intrusion, the information will not be dismissed on the ground that the term of office which the respondent is charged with having usurped has expired since the filing of the information.³

§ 382. Leave to file information in discretion of court.—The granting of leave to file such informations has uniformly been held, both in England and in this country, to be within the discretion of the court. But although leave is not given as a matter of course, yet a court ought not to arbitrarily refuse it, but should exercise a sound legal discretion upon a consideration of the circumstances of each case.⁴

¹ Com. v. Small, 26 Pa. St. 31. See 6 Ad. & E. 810; State v. Smith, 48 Vt. 266; People v. Waite, 70 Ill. 25. See Com. v. Reigart, 14 Serg. & Rawle, 216. In Missouri, a writ of *quo warranto* is

a writ of right, and issues as a matter of course on demand of the proper officer. State v. Stone, 25 Mo. 555. The statute of Illinois in relation to informations in the nature of *quo warranto* is a substantial, if not literal, copy of 9 Anne, ch. 20, on the same subject. In Atty. Genl. v. Delaware, etc., R.R. Co., 38 N. J. 282, it was objected on behalf of the defendants that they could not be required to answer the information, because it was filed without the leave of the court. The objection, how-

² People v. Hartwell, 12 Mich. 508.

³ Rex v. Wardroper, 4 Burr. 1964; Rex v. Dawes, Ib. 2022; Rex v. Sergeant, 5 Term Rep. 467; Rex v. Perry,

The propriety of making the inquiry, and the position and motives of the relator in proposing it, as well as the nature of the charge, are to be considered by the court in granting or denying the motion. In *People v. Kankakee River Improvement Co.*,¹ the court was invoked to exercise its discretionary power under the statute, and only assess a fine, the statute providing that, instead of judgment of ouster from a franchise for its abuse, unless the court was of opinion that the public good demanded such judgment, a fine might be assessed. SHELDON, J., in delivering the opinion, said : "Had there been but the omission of some duty of minor importance, the alternative of a fine might be considered ; but the non-performance here is of a thing which is of the essence of the contract. It goes to the object of the incorporation, not doing the very thing the performance of which was the purpose and object for which the company was instituted. It is failure by the corporation to act up to the end of its creation. The demand of the public good is nothing less than that there should be a resumption by the State of the corporate franchise of which there has been such misuser ; that the company should be made to give way, so as to afford opportunity through some other instrumentality for the accomplishment of this work of public advantage."

But the court will not allow the name of the State to be

ever, was held not well taken. The court said that when facts exist which in the opinion of the attorney-general call for a *quo warranto* information, he has a right to present it without leave asked ; that such a power existed at common law ; that before 9 Anne, *quo warranto* informations were filed either by the attorney or solicitor general *ex officio*, or by an officer of the court under the direction of the court at the instance of parties concerned ; that the statute of 9 Anne merely regulated the practice in some cases, requiring the parties concerned to be named as relators, and

to become responsible for costs ; that in New Jersey the statute substituted the attorney-general for the master of the crown office, and extended the range of the English act ; but that the attorney-general was only a nominal party,—a mere officer of the court subject to its control ; and that he was not there as attorney-general exercising in the cause the power which such an officer had at common law, and which he still wielded when he appeared *ex officio*.

¹ 103 Ill. 491.

used and its own time to be occupied improperly or unnecessarily, or merely to gratify the grudge of a relator. The State's attorney usually submits a motion based on affidavit for leave to file the information. A rule *nisi* is laid on the defendant to show cause why the information should not be filed; and the respondent may answer the rule by counter affidavits. On an information for the purpose of vacating the charter of a bank, it appeared that before the commencement of ordinary business transactions, or immediately before that event, the stock paid in was mostly returned to the several owners in the form of loans on private security; that by these means the amount of stock in actual possession as the basis of corporate responsibility was reduced from the sum of twenty thousand dollars required by the act, to about three thousand, and that upon this reduced capital the respondents proceeded to do business, regulating the amount of business by the amount of stock retained. This in effect changed the bank from an institution having at least twenty thousand dollars effective capital, to one possessing a capital of but three or four thousand dollars, with capabilities restricted in proportion. The bank was chartered with a limitation of capital at forty thousand dollars, twenty thousand of which were required to be realized as an indispensable qualification for commencing business. This limitation and requirement were such as the public interest and convenience were supposed to demand, and it could not be assumed that in expectation of a less ability to furnish bank accommodations, the charter would have been granted. The course pursued by the respondents was therefore an obnoxious deviation from that contemplated by the act of incorporation, and furnished sufficient probable cause for instituting the prosecution. The court said: "The power of the court in this case is simply to declare the charter vacated. This power is to be exercised in discretion. It is by no means certain that the respondents intended a fraudulent violation

of the act, since they appear to have contemplated a gradual return of the loaned stock, and a considerable portion of it would seem to have been already returned. The business concerns of the bank appear to have been managed with skill and ability, and no existing danger to the community seems to require the destruction of the institution. Another consideration of much weight arises from the character of this proceeding. It is not one in which the court can act as a court of chancery, and bring the affairs of the institution to a gradual close, consulting the safety of creditors and all others concerned. If we act at all, it must be in a summary and final manner. A more just and beneficial remedy may be sought under the general law, if the case shall hereafter be found to require it.”¹

In all cases where a charter exists, and a question arises concerning the exercise of an office claimed under it, the court may give leave to file an information; because in such case, although it cannot be said that any prerogative or franchise of the State has been usurped, yet, what is much the same thing, the privilege granted has been abused.² The granting or withholding leave to file an in-

¹ State v. Essex Bank, 8 Vt. 489. The statutes of several of the States provide that corporations, when their charters expire or are annulled by forfeiture or otherwise, shall be continued bodies corporate for a specified period from such time, for closing their concerns, and that the court, upon the application of any creditor or stockholder, may appoint receivers for that purpose, with power to prosecute or defend suits in the corporate name. Such a statute was passed in Massachusetts as early as 1812. In Increase v. Babcock, 23 Pick. 346, the court said: “When the charter is repealed, it has ceased to have force as a charter. It has expired. This is its dissolution. The corporation derives no power from it. It

cannot carry on business. . . . This qualified prolongation of the existence of the corporate body is in the nature of an administration of its estate. All rights under the defunct corporation were fixed at its dissolution. But it has a nominal existence for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharging its obligations and liabilities.” See Nevitt v. Bank of Port Gibson, 6 Sm. & Marsh, 513; Miami Exporting Co. v. Gano, 13 Ohio, 269; Renick v. Bank of West Union, Ib. 298.

² Com. v. Arrison, 15 Serg. & Rawle, 127. See Com. v. Woelper, 3 Serg. & Rawle, 52; Com. v. Cain, 5 Id. 510; Com. v. Murray, 11 Id. 73.

formation at the instance of a private relator, to test the right to an office, rests in the sound discretion of the court to which the application is made, even though there be a substantial defect in the title by which the office is held.¹ When the information is filed, the discretionary power of the court is expended, and the issues of law or fact raised by the pleadings must be tried and decided in the same manner, and with the same strictness, as in any other case, civil or criminal.²

§ 383. **When an information will not lie.**—The people of the State have no general power to invoke the action of the courts by suits in their name of sovereignty, for the redress of civil wrongs sustained by individual citizens at the hands of others. It is not sufficient for the people to show that wrong has been done to some one. The wrong must appear to have been done to the people, in order to support an action by the people for its redress.³ An information in the nature of *quo warranto* is not the proper remedy for the recovery of real estate, except when the real estate has escheated or been forfeited to the State for its use.⁴ When a turnpike company has not followed the directions of the act relative to the compensation to be made to the owners of the land through which the road has been made, the company is a trespasser. The fact that the public is in no way interested in such a controversy, is a sufficient reason for not granting an information in the nature of *quo warranto*.⁵ An information alleged that the defendant was a corporation organized under an act authorizing the construction of plank roads; and that the defendant had wrongfully and unlawfully exercised powers not conferred

¹ State v. Mead, 56 Vt. 353; State v. McNaughton, Ib. 736; State v. Fisher, 28 Id. 714; State v. Smith, 48 Id. 266. Strange, 1196; Rex v. Shepherd, 4 Term Rep. 381; Regina v. Mousley, 8 Ad. & E. 957.

² State v. Brown, 5 R. I. 1.

⁴ State v. Shields, 56 Ind. 521.

³ People v. Alb. & Susq. R.R. Co., 57 N. Y. 161; Rex v. Dawbney,

⁵ People v. Hillsdale, etc., Turnpike Co., 2 Johns. 190.

by law, in that it had entered upon the lands of three several persons, (naming them, and describing the lands,) cut timber, dug up soil, and constructed its road upon the lands without authority or license from the owners. It was claimed that the case came within the clause of an act which provided that an information might be filed when a corporation did or omitted acts that amounted to a surrender or forfeiture of its rights and privileges, or when it exercised powers not conferred by law, inasmuch as the defendant had no right to construct its road across any one's land without his consent, and without having in some manner acquired the right of way. A demurrer to the information having been sustained, the court, on appeal, said : "We think that the provision in the statute above quoted, in reference to the exercise of powers not conferred by law, was intended to meet cases where corporations undertake to exercise corporate powers or franchises not conferred upon them, as for example, where an insurance company exercises the powers of a banking company, or where a corporation of any description usurps and exercises corporate powers of a different character from those provided in the law of its organization. If the corporation has entered upon the lands of the persons named in the information, and located its road thereon without leave, not having acquired the right of way, those persons have ample legal remedies by suits in their own names ; but they cannot adjust their private rights in a proceeding of this kind."¹ An information in the nature of *quo warranto* against a railroad company cannot be sustained which does not allege that the company is not incorporated, but states that the company does not intend to construct the whole of its road according to the description in the articles of association, and that it means to make use of its organization for the purpose of condemning and appropriating private property

¹ State v. Kill Buck Turnp. Co., 38 Ind. 71, per WORDEN, C. J.

over which to construct its railroad. If the road of the company should not be constructed as contemplated within the time which the law allows for its completion, the proper remedy may then be applied. Should the company attempt to condemn and appropriate to its use private property without being authorized and empowered to do so, the person whose property it seeks to appropriate can interpose and prevent such appropriation.¹

A mere vague apprehension of future mischief is not a cause for the dissolution of a corporation. A telegraph company leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the other company in which the majority in interest of the stockholders of the first-named company were also interested. It appeared, however, that since the petition was filed, the lease in question had been cancelled by a vote of the directors of each of the two companies. It was contended that as the majority in interest had shown a disposition to deal unfairly with the rights of the minority of the stockholders, they could not any longer be trusted, and that as the court would discharge trustees who had wilfully violated the duties of their trust, so, in this case, it should dissolve the corporation. The court, in dismissing the petition, said: "Such a power is one of great delicacy, and must be exercised with extreme caution, as the dissolution of a corporation must affect seriously not only the property of the petitioners, and of those by whom such frauds have been committed, or from whom they are to be apprehended, but also of those stockholders who are not parties to the controversy as such, and are represented in it only through the corporation itself. No proceeding so radical as the destruction of the organization should be taken, unless, after careful examination, the court were fully

¹ State v. Kingan, 51 Ind. 142. See Pa. St. 26; State v. Pipher, 28 Kansas, Com. v. Pittsburg, etc., R.R. Co., 58 127.

satisfied, whatever the disadvantages and losses attending such a step might be, that in no other way could the rights of all innocent stockholders be so well protected.”¹ On an information in the nature of *quo warranto* against a bank for a forfeiture of its franchises, it was held a sufficient defense that the bank was then doing business and redeeming its bills; that it had a right recognized by its charter to suspend business; that if proceedings were not instituted against it until it had become solvent, the right to prosecute for a forfeiture had ceased; that had the insolvency continued until the prosecution was commenced, the forfeiture would have been irremediable; but as the bank had resumed the redemption of its bills, and in the meantime complied with its charter by discontinuing banking operations, it was too late to complain of insolvency which no longer existed.²

¹ Matter of Franklin Tel. Co., 119 Mass. 447. Where a railroad company has diverted a highway *ultra vires*, but with a *bona fide* view to the convenience of the public, a court of equity will not compel the company to replace the highway so as to make its work *intra vires*, if doing so will cause greater inconvenience to the public, or to the complaining section of the public. But the attorney-general will not be prevented from proceeding to abate any obstruction or nuisance which he may consider to exist on the highway in question; and an information will be dismissed without costs, and without prejudice to his taking such steps, by indictment or otherwise, as he may think proper. Atty. Genl. v. Ely, etc., R.R. Co., L. R. 6, Eq. 106.

² People v. Bank of Niagara, 6 Cowen, 196; People v. Washington & Warren Bank, Ib, 212. The omission of an express duty prescribed by a charter to a corporation is a cause of forfeiture; its performance being in the nature of

a condition for the breach of which the sovereign may resume his grant. With respect to the duties arising by implication from the nature of the franchise granted, and the interest of the public in their due and continued performance, only such acts or omissions will be destructive to the charter as concern matters which are of the essence of the contract between the State and the corporation. But when the charter expressly imposes a duty which the company is to perform, although it may not declare that non-performance shall make a forfeiture, yet it must be taken to have been required by the State as a material stipulation for the non-performance of which by the corporation the State may put an end to the contract. If, however, the sovereign, with a distinct knowledge of the breach of duty by the corporation, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing notwithstanding

A *quo warranto* is not a proper remedy for a breach of trust.¹ If the officers of a corporation organized under a particular name, use, in the exercise of the corporate franchises, an abbreviation of the name, it is not a usurpation, and will not support a proceeding by *quo warranto* to oust them.² The question of power to extend a city government over additional territory annexed cannot be raised by *quo warranto*. It does not follow that because the constitutionality of a law may arise in deciding whether a person is legally in office, that *quo warranto* may be resorted to in order to determine as to the validity of a law. If an officer threatens to exercise power not conferred upon the office, or to exercise the powers of his office in a territory or jurisdiction within which he is not authorized to act, persons feeling themselves aggrieved may usually restrain the act by injunction.³ Where, under a statute providing that an information might be filed by the prosecuting attorney in the circuit court upon his own relation, whenever he deemed it his duty to do so, or should be directed by the court or other competent authority, or by any other person on his own relation, whenever he claimed an interest in the office, franchise, or corporation, which was the subject of the proceeding, the relator was not interested in the franchise alleged to have been unlawfully exercised, it was held that his remedy, if any, was by injunction, and not information.⁴ A statute which provides that an information may be filed against any person unlawfully holding or exercising any public office or franchise within the State ; or any office in any corporation created by the

such known default, it must be taken, as in other cases of breaches of condition, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of previous defaults. Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. 456; People v. Manhattan Co., 9 Wend. 351.

¹ Dart v. Houston, 22 Ga. 506.

² People v. Bogart, 45 Cal. 73; People v. Sierra, etc., Co., 89 Id. 514, and cases cited.

³ People v. Whitcomb, 55 Ill. 172.

⁴ State v. Smith, 32 Ind. 213.

laws of the State ; and when any public officer has done or suffered any act which works a forfeiture of his office ; or when any persons act as a corporation in the State without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation ; or when they exercise powers not conferred by law, does not authorize proceedings in *quo warranto* for the mere irregular exercise of a power, although the irregularity may be sufficient, when tested, to vitiate or render void the act done. If the power attaches, the manner of its exercise cannot be challenged by information in *quo warranto*. Nor is it within the legitimate scope of the relief afforded by such proceedings to declare null and void what may have been done, but only to affirm or adjudge as unauthorized, the claim to an office, franchise, or power, which may have been unlawfully exercised with or without color of right, and, in case of an adverse claimant, to award the office or franchise to him who is legally entitled to it.¹

An act permitting the issuing of a writ of *quo warranto* in case any question shall arise concerning the exercise of any office in any corporation created by authority of law, and having the chief place of business within the respective county, confers no jurisdiction except in questions of strictly corporate offices. Professorships in a university created by the trustees of the institution for the purpose of accomplishing the objects contemplated by the act of incorporation, are not corporate officers, but the incumbents are merely agents or employés of the corporation, whose services if not regulated by contract with the board of trustees may be dispensed with whenever the interests of the institution in their judgment demand it.² When a lot-

¹State v. Lyons, 31 Iowa, 432. mistake. State v. Pawtuxet Turnp. There must be more than accidental Corp., 8 R. I. 182. negligence, or excess of power, or mere

² Philips v. Com., 98 Pa. St. 394.

tery is granted to a corporation, the managers of the lottery appointed to the trust by the corporation, are not liable to an information in the nature of *quo warranto*, they being the private agents or servants of the corporation, and removable by it at pleasure, or at least for good cause. The only effect of a judgment against them upon such an information would be their removal from their position, and the corporation might immediately reinstate them.¹ An information in the nature of *quo warranto* cannot be maintained to oust the captain of a military company from his office on the ground that he was not legally commissioned.² The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise. It is not a State franchise, but a mere grant of authority resting in contract or license, and is not subject to a proceeding by *quo warranto*.³ When the moving party and defendant do not claim under the same charter, it is not a case proper for an information in the nature of *quo warranto* to show by what authority the defendant fills the office of minister of a religious society.⁴ The relator is supposed to have exhibited his whole case in its most favorable aspect, and if it should appear to the court, upon an examination of the affidavits, that, upon facts stated, it ought not upon legal principles to interfere in the matter, it will of course be improper for it to grant leave to file the information.⁵

¹ Com. v. Dearborn, 15 Mass. 125. See People v. Hills, 1 Lansing, 202; Rex v. Corp. of Bedford Level, 6 East. 356; Darby v. Regina, 12 Clark & Fin. 520.

² State v. Wadkins, 1 Rich. 42; RICHARDSON, J., dissenting, maintained that as against the assumption of an office in virtue of the formula of a commission, there could be no doubt of the right and duty of the court to proceed by the writ of *quo warranto*, and to order the divestiture of the supposed commission if illegally obtained. The

test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power. The position of chief engineer of a railroad company is not such an office. Eliason v. Coleman, 86 N. C. 235.

³ People v. Gas Light Co., 38 Mich. 154.

⁴ Com. v. Murray, 11 Serg. & Rawle, 73.

⁵ People v. Tisdale, 1 Douglass Mich. 59.

§ 384. By whom prosecuted.—At common law, a writ of *quo warranto* could only be sued out by the law officers of the crown. It was regarded as the king's writ of right to be issued in case of the usurpation of an office. This writ at an early day gave place, as we have seen,¹ to the more convenient proceeding of an information in the nature of *quo warranto*. The officers of the crown were accustomed to file informations at discretion upon the application of individuals who were not named as relators in the proceedings.² By the act of 4 and 5 of William and Mary,³ which took effect in 1693, and was passed to prevent frivolous informations, no information could be filed without express orders to be given by the Court of King's Bench in open court. The statute of 9 Anne,⁴ provided that in informations relating to corporate offices or franchises, the name of the relator should be mentioned.⁵

¹ *Ante*, § 380.

² Cole on Information, 127.

³ Ch. 18.

⁴ Ch. 20, 1711.

⁵ State v. Gleason, 12 Fla. 190; Jersey City Gas Light Co. v. Consumers' Gas Co., 40 N. J. Eq. 427; State v. Butler, 15 Lea Tenn. 104. "In England, the Court of King's Bench having a general superintending control over the criminal jurisdiction of the whole kingdom, there is attached to the crown side of that court a department denominated the crown office. At the head of this department is an officer of the crown known as the king's coroner and attorney, commonly called the master of the crown office. This officer has authority to file informations in the name of the king in suitable cases; and being at the same time an officer of the court and subject to its orders and directions, the practice has been for individuals specially affected or injured by any usurpation of office, or other wrong or injury to the public, to file in court an application for a direction to the master

of the crown office to file an information with a view to redress the public wrong of which the relator complains; whereupon the relator is required, as the public never pay costs on failure of a public prosecution, to give security to the party complained of for costs if the prosecutor should not prevail. Upon such application, the court usually order a notice to the party complained of to appear and show cause, and if on appearance probable cause is shown, the usual course is to direct the master of the crown office to file an information at the suit of the king, but naming the relator, after which it is conducted by the relator at his own expense very much in the nature of a civil suit. . . . An information by the attorney-general *ex officio* is filed on his own authority, and usually for every class of violations of public right, though both are public prosecutions instituted by acknowledged and authorized public officers." SHAW, C. J., in Goddard v. Smithett, 3 Gray, 116.

An information for the purpose of dissolving a corporation, or of seizing its franchises, can only be prosecuted by the authority of the State granting the charter, to be exercised by the legislature or by the attorney or solicitor-general acting under its direction or *ex officio* in its behalf. For the State may waive any breaches of any condition expressed or implied on which the corporation was created, and the State must be a party to the proceeding.¹ The usurpation of an office established by the constitution under color of an executive appointment, and the abuse of a public franchise under color of a legislative grant, are public wrongs and not private injuries, and the remedy by *quo warranto* must be on the suggestion of the attorney-general or some authorized agent of the State.² The erection of toll-gates upon a public turnpike road and demand and receipt of toll on passing such gate upon the road is a liberty or franchise grantable by legislative authority alone. The exercise of such right without authority is a franchise. The object of a writ of *quo warranto* in such a case is to vindicate the public authority and to resume the usurped franchise by an ouster of the usurper. The remedy cannot be wielded by an individual who may choose to appear as the champion of the public interest, but can be properly commenced only upon the motion of the attorney of the State. Upon the motion of the latter, founded on affidavits or other evidence disclosing the wrong complained of, the court may allow him to file an information on which the

¹ Com. v. Union Ins. Co., 5 Mass. 230; Com. v. Fowler, 10 Id. 290; Farnham v. Del. & Hudson Canal Co., 61 Pa. St. 265; Houston v. Neuse River Nav. Co., 8 Jones N. C. 476; President, etc., v. McConaby, 16 Serg. & Rawle, 144; State v. Paterson, etc., Turnp. Co., 1 Zab. 9; State v. Ashlēy, 1 Ark. 513. In Pennsylvania a *quo warranto* to determine the right of individuals to act as school directors, may be issued

on the information of the district attorney without a previous rule to show cause. Gilroy v. Com., 105 Pa. St. 484.

² Murphy v. Farmers' Bank, 20 Pa. St. 415; Com. v. Farmers' Bank, 2 Grant's Cas. 392; Voisin v. Leche, 23 La. Ann. 25; Miller v. Palermo, 14 Kansas, 14; Robinson v. Jones, 14 Fla. 256; State v. Schnierle, 5 Rich. S. C. 299.

writ will issue.¹ "In Massachusetts the attorney and solicitor-general has authority as incident to the office to file informations *ex officio* in the name and behalf of the State. The information is in its nature a prosecution for some offence against the government by an application to a court of criminal jurisdiction, and is essentially a public, criminal prosecution. When filed by the attorney-general, it is done at his own discretion, according to his own view of the rights of the government, without leave of the court; nor will the court direct or advise him on the subject."² In New York, upon leave granted, the attorney-general may bring an action against a corporation created by the State to procure a judgment vacating the charter, or annulling the existence of the corporation on the ground that it has either, first, offended against any provision of an act by or under which it was created, altered, or renewed, or an act amending the same and applicable to the corporation; or, second, violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers; or, third, forfeited its privileges or franchises by a failure to exercise its powers; or, fourth, done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or, fifth, exercised a privilege or franchise not conferred upon it by law. The court before granting leave may, in its discretion, require such previous notice of the application as it thinks proper to be given to the corporation or an officer of it, and may hear the corporation in opposition. The action is triable of course and of right by a jury.³ In In-

¹ Com. v. Lexington, etc., Turnp. Co.,
6 B. Mon. 397.

² Goddard v. Smithett, 3 Gray, 116,
per SHAW, C. J. In Texas there is no
statute extending the right to a citizen,
and, consequently, the proceeding must
be by the attorney-general in the name
of the State. Wright v. Allen, 2 Texas,

158. See Wallace v. Anderson, 5
Wheat. 291.

³ N. Y. Code, Ed. of 1884, secs. 1798,
1799, 1800. In Slee v. Bloom, 5 Johns.
Ch. 379, 381, Chancellor KENT held
that the forfeiture of corporate rights
must be judicially ascertained and de-
clared, and that corporate power which

diana an information may be filed against any person or corporation where any association or number of persons act within the State as a corporation without being legally incorporated. The information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation. The information must consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court.¹

In questions merely involving the administration of corporate functions or duties which touch only individual rights, such as the election of officers, admission of a corporate officer or member, and the like, the writ may issue at the suit of the attorney-general, or of any person or persons interested in prosecuting the same.² In Pennsylvania, before the act of 1836, informations in the nature of *quo*

had been abused or abandoned could only be taken away by regular process, and he expressed the belief that there was no instance of calling in question the rights of a corporation as a body for the purpose of declaring its franchises forfeited, but at the instance and on behalf of the government. S. P. Vernon Soc. v. Hillas, 6 Cowen, 23. It was held at an early day in Illinois that a proceeding by *quo warranto* was within the intent and meaning of the clause of the constitution of that State declaring that all prosecutions should be carried on in the name and by the authority of the people. Donnelly v. People, 11 Ill. 552; People v. Miss. & Atlantic R.R. Co., 13 Id. 66; Wight v. People, 15 Id. 417.

¹ 2 Rev. Sts. of Ind., Ed. of 1876, p. 298, sec. 749; p. 299, secs. 750, 751; State v. Beck, 81 Ind. 500. In Tennessee, under the Code, secs. 3412, 3413, the attorney-general must be a party to a suit to have the franchises of a corporation declared forfeited by reason of its not complying with the

provisions of its charter. State v. White's Creek Turnp. Co., 3 Tenn. Ch. 177.

² Com. v. Union Ins. Co., 5 Mass. 230; Murphy v. Farmers' Bank, 20 Pa. St. 415; Yonkey v. State, 27 Ind. 236; Parker v. Smith, 3 Minn. 240; Miller v. Palermo, 12 Kansas, 14; Republica v. Griffiths, 2 Dallas, 112. The distinction between informations in the nature of *quo warranto* to impeach an election or admission of a corporate officer or member and informations to dissolve a corporation is well settled. In North Carolina, when a person usurps an office or intrudes into it, or is found unlawfully holding or executing it, the Revised Code, ch. 95, sec. 101, authorizes the attorney-general or a solicitor for the State to institute the proceeding. Houston v. Neuse River Nav. Co., 8 Jones, 476. When the action is for usurping a public office, if the defendant has received fees or emoluments of the office, he may be arrested. Patterson v. Hubbs, 65 N. C. 119; Loftin v. Sowers, Ib. 251.

warranto at the instance of a private relator were always required to be with leave of the court, and leave was not granted except upon the application of a private relator. No one was held competent who had not a sufficient interest to warrant his interference, and the statute made no change in this particular. As the Pennsylvania act was reported by the commissioners, it was drawn so as to provide that writs should be granted in such cases only upon the suggestion of the attorney-general or his deputy. The legislature, however, altered the provision and enacted that such writs might be issued upon the suggestion of any person or persons desiring to prosecute the same. The statute of 9 Anne allowed informations at the relation of any person wishing to sue or prosecute them, and under that statute the rule was that a private relator must have an interest. The Pennsylvania act, which substantially incorporates the English statute, has received the same construction, and the court has construed the words, "any person or persons desiring to prosecute the same," to mean any person who has an interest to be affected. It does not give a private relator the writ in a case of public right involving no individual grievance.¹ Practically, it is a matter of but little consequence whose name may be used, so that a meritorious case is presented to the court and substantial justice can be administered between the real parties to the controversy.

¹ Com. v. Allegheny Bridge Co., 20 Pa. St. 185; Com. v. Railroad Co., Ib. 518; Murphy v. Farmers' Bank, *supra*; Com. v. Cluley, 56 Pa. St. 270. On a petition to obtain authority to file an information in the nature of *quo warranto* against a railroad company under a statute providing that any person whose private right or interest had been injured or put at hazard by the exercise by any private corporation of a franchise or privilege not conferred by law, might apply to the court for

leave to file such an information, the question was suggested by SHAW, C. J., but not determined by him, whether the private right of the petitioner must be some right, legal or equitable, recognized by law, and be such a right or interest that, in case of diminution or infringement, the petitioner would have some remedy at law or in equity, and that the purpose of the act was to afford him a better remedy. Boston, etc., Corp. v. Midland R.R. Co., 1 Gray, 340.

The nature of the right asserted requires a speedy remedy. This can be accomplished as well by proceeding in the name of the attorney-general as of the State, or of the party directly interested, the object being to determine who has the legal right to hold the office.¹ In Wisconsin it was stated by the court in an early case that the usual practice in that State was for the attorney-general to institute the proceeding upon his own relation or that of another; or for the relator to apply to that officer for the use of his name; or, if he refused on such application, to apply to the court, which might allow the information to be filed, or not, in its discretion; and that it was only when the attorney-general refused, or so conducted the suit as to indicate hostility to the rights of the relator, or on leave granted by the court under the circumstances of the special case, that the relator would be permitted to control the proceedings against the authority of the attorney-general.² Corporators who attend and vote for the election of officers are not competent relators to question the titles of those elected if they knew of the objection on which they rely; a general principle on which the court acts with respect to the qualification to be a relator being that he who has concurred in inducing a party to exercise an office cannot be heard on an application to turn him out of the office.³

¹ Lindsey v. Atty. Genl., 33 Miss. 508.

file an information in the nature of a *quo warranto*." Sts. of Mass. of 1852, ch. 312, sec. 42; Goddard v. Smithett, 3 Gray, 116.

² Atty. Genl. v. Barstow, 4 Wis. 567. A religious society is not within the provisions of the act of Massachusetts that "any person whose private right or interest has been injured or is put in hazard by the exercise by any private corporation or any persons claiming to be a private corporation, of a franchise or privilege not conferred by law, whether such person be a member of such corporation or not, may apply to the supreme judicial court for leave to

³ Grant on Corp. 254, and cases cited; Cole v. Dyer, 29 Ga. 434. In Rex v. Slythe, 6 Barn. & Cress. 240, ABBOTT, C. J., said: "It has been generally regarded as a rule of corporation law that a person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the titles of those mediately or immediately derived from that elec-

§ 385. Who to be made parties defendants.—If the information has for its object to oust certain persons from acting as a corporation, and to test the fact of their incorporation, it should be against them as individuals; while if the object is to effect the dissolution of a corporation which has an actual existence, or to oust such corporation of some franchise which it unlawfully exercises, the information must be filed against the corporation.¹ In *Rex v. Amery*,² it was urged on the part of the prosecution that there were but two sorts of proceedings against a corporation: 1st. When a corporation legally created abuses any of its franchises, or usurps others which do not belong to it, the information should be against the corporation as such, and a judgment against it be a judgment of seizure; but 2d. When a body of men assumes to be a corporation, and the information is brought for usurpation, it cannot be maintained against them in their corporate name, but only as individuals, and in such case there must be judgment of ouster. ASHURST, J., in giving the opinion of the court,

tion. . . . It seems to me that to allow an inquiry in every instance into the relator's knowledge or ignorance of every particular fact would lead to much intricacy and confusion. I think that every corporator must be presumed conusant of that which has recently taken place in the corporation of which he is a member, unless he shows the contrary. . . . But, in order to prevent any misunderstanding on this point, I will add, that if a person should concur in an election in ignorance of some objection, and that it has come to his knowledge since the election, and that it is a matter which ought to be inquired into, I would by no means have it inferred, from the decision in the present case, that such an application ought not to be heard." See *State v. Lehre*, 7 Rich. S. C. 234.

¹ *People v. Rensselaer, etc., R.R. Co.*, 15 Wend. 113; *Mud Creek Draining Co. v. State*, 43 Ind. 236. See *People v. Richardson*, 4 Cowen, 97, note; *Commercial Bank v. State*, 6 Sm. & Marsh, 599; *State v. Cincinnati Gas Light Co.*, 18 Ohio St. 262. The fact that a creditor of an incorporated turnpike company has levied upon the franchise, and acquired the right to the tolls for ninety-nine years, does not introduce a new party upon the question of forfeiture of the charter. It is not enough that a private individual has a pecuniary interest to be affected by the judgment of forfeiture. Such would be the case of any stockholder of a banking or insurance corporation. *Com. v. Tenth Mass. Turnp. Corp.*, 5 Cush. 509.

² 2 Term Rep. 515.

said that the information called upon the mayor and citizens to show by what authority they claimed to be a corporation; *non constat* by that information that there was any corporation, the information, as it charged them with having usurped the name, privileges, and authority of a corporation without any legal right, importing the contrary. He said that if any charter or prescription existed, it was incumbent on the defendants to appear and show it, and that by not doing so, they admitted there was none. An information was brought to inquire by what right two defendants demanded and took tolls of persons crossing a bridge on the Connecticut River. In their answer they set forth a charter granted to a bridge company, and alleged that by purchase they secured to themselves a transfer of all the shares into which the capital stock was divided; that the defendants composed the corporation; that the corporation was required by its charter to make returns to the superior court of its receipts from tolls as often as once in five years; that such accounts were rendered in 1837, and in 1842, since which time none had been rendered by reason of their ignorance of such requirement; that the tolls received by them had never exceeded the rates established by the court, and they asked that they might then be permitted to render such accounts. The neglect of the corporation to furnish such exhibits, did not by the terms of the charter subject the corporation to a forfeiture of its franchise *ipso facto*, but such forfeiture must be regularly proved and established upon proper proceedings instituted for that purpose. It was objected, on demurrer to the sufficiency of the information, that it was brought against the stockholders, and not against the corporation itself, and that the information did not ask for a forfeiture of the charter. It was held that these objections could not prevail; that when an information had for its object to oust the defendants from acting as a corporation and to test the

fact of their incorporation, it must be filed against individuals; and that the offer of the defendants to make the returns required by their charter, and their request to be permitted to do so, was in effect a confession that their franchise was subject to forfeiture on account of their neglect in this respect.¹

§ 386. Essential averments in information.—When any person or association of persons is charged with usurping the franchise of a corporation, it is sufficient for the attorney-general to call upon them in general terms to show by what authority they claim the right to exercise the franchise. But when the nature of the proceeding is such as to assume the actual existence of a corporation, and it is alleged that the defendants usurp some authority therein, no ground is shown for calling upon them to show their right, until it is made to appear that a corporation exists. The claim to a corporate franchise which does not exist in fact, may be a great public wrong demanding immediate redress; but the claim to an office in a corporation which has no existence, can hardly be a matter of public concern, unless accompanied with the attempt to exercise a corporate franchise, in which case the remedy would be an information not for the unlawful intrusion into an office, but for the usurpation of the franchise. Therefore, an information charging the defendant with intruding into an office, must show that a corporation exists; for, until that is shown, it is not made to appear that there is any office into which the defendant can intrude. An information may aver the existence of a corporation which has been created by a special charter, in general terms. When, however, the body, if it exists as a corporation, must have been constituted such under some general law, the bare averment that it is a corporation, is only a conclusion of law drawn by the pleader,

¹ State v. Barron, 57 N. H. 498. See Turnpike, 15 Id. 162; People v. Rail-State v. Olcott, 6 N. H. 74; State v. road, 15 Wend. 113.

which the court should have the means of drawing for itself from the facts set forth.¹

If the statute requires that the grounds shall be set forth on which a forfeiture is alleged to have been incurred, the information, like an indictment or declaration, must state with certainty to a common intent the facts and circumstances which constitute the offence in its substance, whether of misfeasance or nonfeasance, so that it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged.² W. having been appointed one of the trustees of the Michigan Institution for Educating the Deaf and Dumb, was subsequently notified in writing by the governor of the State that the latter had removed him for official misconduct and neglect of duty. The governor also on the same day appointed D. a trustee to fill the vacancy occasioned by the removal of W., who refused to surrender the office. Whereupon, the attorney-general filed an information in the nature of *quo warranto* on the relation of D., alleging that W. had usurped, intruded into, and unlawfully held and exercised the office. The respondent in his plea set forth his appointment and commission, and stated : that he had entered upon the duties of his office ; that he had

¹ People v. De Mill, 15 Mich. 164, per COOLEY, J. See Miller v. Wildcat Gravel Road Co. 52 Ind. 51.

² Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. 456. In North Carolina, although the act of 1831, Rev. Sts., ch. 26, in relation to proceedings in *quo warranto*, dispensed with technical formalities, yet it was held that the information must set out a good cause of forfeiture in its essential circumstances of time, place, and overt acts. Usually, in *quo warranto*, the charge is general that the defendant, without lawful warrant, uses the franchise, and does certain acts as a cor-

poration. The plea refers to the charter as the warrant for acting as a corporation, and states such parts of it as authorizes the defendant to exercise the corporate franchise. The replication specifies particular acts or omissions on which it is intended to insist that a forfeiture has been incurred, to which the defendant may either demur or take issue. The foregoing act was intended to simplify the proceedings by having the whole matter of accusation set forth at once in the information, or, at least, sufficient to entitle the State to judgment of ouster. Ib.

not been guilty of official misconduct or neglect of duty; that he had received no notice of any complaint or claim against him as trustee; and was wholly ignorant of what official misconduct or neglect of duty he had been guilty. The prosecution replied that W. was guilty of official misconduct and neglect of duty as declared by the governor. It was held, on demurrer to the replication, that the relator should have specified the acts of official misconduct and neglect of duty of which the respondent had been guilty.¹ In an information in the nature of *quo warranto* filed against a turnpike company on the ground that the road is not kept in repair, it must be alleged that the company has permitted the road to become in such a condition as renders it dangerous or inconvenient to travelers.² In People v. Manhattan Co.,³ the conclusion of SUTHERLAND, J., was, that in order to show a ground of forfeiture for nonfeasance, the attorney-general was bound to state all such facts as were material to put the corporation in default; and he cited cases on pleading justifications in actions for libel, as illustrating the strictness required. In the case before him the complaint was that the defendant had not complied with a condition subsequent by which it was bound to furnish water to the city of New York for the use of such citizens as were willing to agree for and take the same. It was held necessary to show that some one at least was willing and desirous, gave notice that he was so, and made a request to be supplied with water, and that the company disregarded such notice and request.⁴

¹ Dullam v. Willson, 53 Mich. 392.

² People v. Bristol, etc., Turnp. Co., 23 Wend. 222.

³ 9 Wend. 351.

⁴ When a statute declares that a failure to finish a railroad and put it in operation within a specified time shall render void the act of incorporation so far as the unfinished portion may be concerned; and the effect of the pro-

vision, if applied, might, in many cases, by preventing thereafter a completion to terminal or connecting points very injuriously affect the value of the completed portion, the statute should clearly point out the time within which the company must at its peril complete the construction of its road. Toledo, etc., R.R. Co. v. Johnson, 49 Mich. 148; Pulford v. Fire Department, 31 Id. 461.

An information which charges that the defendant has intruded into an office, has two distinct objects: first, to oust the defendant; and second, to induct the relator. A decision may be rendered upon the right of the defendant, and also upon the right of the claimant, or only upon the right of the defendant, and an information is sufficient which sets forth enough to call for either. If the allegation that the defendant has unlawfully intruded into and now holds and exercises the office is true, the prosecution is entitled to a judgment of ouster against him. So far as relates to that adjudication, it is immaterial whether the claimant sets forth a valid, or indeed any title, in himself to the office. As the establishment of the title of the relator is but a part of the object of the suit, and not so essential as that a failure in respect to that will prevent any judgment in favor of the plaintiff, a demurrer to the entire complaint will not be sustained. When the time of an election prescribed by law is essential to its validity, it must be stated in the complaint in direct terms, and not be left to mere inference. It is not necessary, however, to state the number of votes given for each candidate, nor that the relator possessed the requisite qualifications for the office.¹ Where the prayer of the information was that the defendant be enjoined from exercising the functions of the offices of secretary and treasurer of a corporation to which he claimed to have been elected at a meeting of the directors, and that he be ousted therefrom, and the information showed not only that there was no quorum, but that the defendant, by a fraudulent scheme, succeeded in going through the form of an election after he had deceived the directors as to the time of the meeting, and had thus designedly prevented their presence, it was held not a valid objection to the information that it did not state that if the absent directors had been present, they would have cast their votes against the defendant.²

§ 387. Appearance of defendant.—The fourth section of the statute of Anne required “proceeding at the most convenient speed that may be,” and “an appearance and pleading as of the same term at which the information shall be filed.” But the practice in the English courts under that statute was, that when the information was filed, if there was not a voluntary appearance, to obtain such appearance by process;—subpoena and attachment, when the defendant could be personally served and was liable to arrest; *venire facias* and *distringas*, in other cases.¹ The rule required the respondents to show cause why an information should not be filed against them, and if they omitted to show cause, the rule became absolute, and the information was filed. It has been held that there need not be a rule to show cause, if the respondent has a hearing before he is compelled to answer the complaint;² nor in case of a small annual township office.³ When leave is granted to file the information the defendant must be summoned, an appearance upon the rule to show cause not placing him in court.⁴ In Vermont it is the duty of the court to fix some time, ordinarily during the same term, for the respondent to appear and plead, and if he does not voluntarily do so, his appearance will be compelled by process.⁵ In New Jersey, a rule is entered that process issue, and that the defendants plead to the informa-

¹ If an appearance was not thus procured, proceedings to outlawry were had against the defendant, and a judgment was rendered that the office or franchise said to be usurped, should be seized. Whether this judgment would mature into a final adjudication of the right, or was merely by way of distress to force the defendant to come within the jurisdiction of the court, is doubtful. No definite time was required to elapse between the *teste* or service of the subpoena, and its return. It might be tested on one day, and served and

returned on the next. The appearance must have been entered on the *quarto die post*, and after the appearance was effected, the defendant must have been ruled to plead. This course was pursued, whether the information was filed under the statute of 9 Anne, ch. 20, or not.

² Murphy v. Farmers' Bank, 20 Pa. St. 415. See Com. v. Jones, 12 Id. 365.

³ State v. Gummersall, 4 Zab. 529.

⁴ Com. v. Spreuger, 5 Binney, 353.

⁵ State v. Smith, 48 Vt. 266.

tion within such time as the court allows. The rule to plead with a copy of the information having been served, the defendants put in their answer. The information is filed only after leave of the court granted, and such leave is not given until the defendant has had notice, either from the attorney of the relator, or by a rule to show cause.¹

§ 388. Defense.—The defendant must either justify or disclaim. Not guilty, would not be a good plea, for it would not answer to the nature of the charge, which is to show warrant or authority.² When the information charges the respondent with intrusion into an office, and calls upon him to show by what right he has assumed to hold it, the respondent may deny that he holds or claims to hold it. Such a plea is a disclaimer, and the prosecution is at once entitled to judgment; for no controversy of fact can arise upon it beyond the simple question of his exercise of the office. If he does not disclaim, he must justify, and by a plea of justification he is bound to show all the facts necessary to establish his lawful right to hold the office.³ This is an affirma-

¹ Atty. Genl. v. Delaware, etc., R.R. Co., 38 N. J. 282.

warranto were substituted for the writ. See People v. Thacher, 55 N. Y. 525.

² Atty. Genl. v. Foote, 11 Wis. 14; State v. Gleason, 12 Fla. 190. When a subject undertook to exercise a public office or franchise, he was, when called upon by the crown through the writ of *quo warranto*, compelled to show his title, and if he failed to do so, judgment passed against him. The foundation of the rule may have been that as all offices and franchises are the gift of the king, they were deemed to be possessed by him, and, until his grant was shown, there could be no presumption that he had parted with them, or invested a subject with the right to exercise by delegation any part of the royal prerogative. The rule was well established, and was preserved when proceedings by information in the nature of *quo*

³ Clark v. People, 15 Ill. 213. In New York, the action under the Code, although differing in some of the formula of procedure from proceedings by writ of *quo warranto*, or by information, is, nevertheless, in substance the same. The position of the defendant, the rules of evidence, and the presumptions of law and fact, are the same as formerly, and now, as heretofore, when the right of a person exercising an office is challenged in a direct proceeding by the attorney-general, the defendant must establish his title, or judgment will be rendered against him. The right of the adverse claimant may also be established in the same proceeding, in which case the burden of proof to show his right is on him. People v.

tive showing which he has the burden of maintaining. No issue of fact can be joined in such cases, except upon a replication, or some pleading subsequent to it, either by denial or by confession and avoidance. It is to be tried by a jury like any other common law issue. As it is not necessary to set forth in the information the facts which would negative the respondent's title, the latter cannot demur to it for such an omission, but must, in all cases where he relies upon his title, make a showing of it by his own pleadings.¹ The defendants were charged as individuals with having usurped and being in the unlawful exercise of the franchises of a bank. They denied that they were guilty, and at the same time disclaimed any right to exercise these franchises. It was held that there was nothing inconsistent in this; for they might not be guilty of the usurpation, and still disclaim any right of banking as individuals, as charged.²

When a defendant claiming title to an office sets up a right to hold over after the expiration of his regular official term, and on that ground attempts to justify his continuance in the office, he is bound to show clearly that no one has at any time been chosen to succeed him. A plea failing to do this is bad, and the prosecution is entitled to judgment of ouster.³ In *State v. Beecher*⁴ the plea was that the defendant was legally appointed, qualified, and en-

Pease, 30 Barb. 588; s. c. 27 N. Y. 45; *People v. Thacher*, *supra*. See *People v. Abbott*, 16 Cal. 358.

¹ *Lake v. Crawford*, 28 Mich. 88. See *People v. Percells*, 3 Gilman Ill. 59. In *People v. Niagara Bank*, 6 Cowen, 196, and the two subsequent cases reported in the same volume, an information was filed in each against a corporation alleging that without any warrant, grant, or charter, it used certain privileges and franchises, to wit, that of being a body politic and corporate in law, fact, and name. The defendant answered that by a certain act of the

legislature, setting out the title of the act, it was ordained, constituted, and declared to be a body corporate and politic in fact and name. But the defendant did not state the acts which were necessary to be done, such as the opening of books of subscription, the subscribing by stockholders, the apportionment of the stock, and the election of directors. No exception was taken to the answer on this ground.

² *State v. Brown*, 34 Miss. 688.

³ *People v. Phillips*, 1 Denio, 388.

⁴ 15 Ohio, 723; s. c. 16 Id. 358.

tered upon the duties of the office, and that he had ever since held and exercised the same, as he had the legal right to do. The court said that he should have stated specifically all of the facts necessary to constitute a good title to hold on to the office ; that he was then a member, etc., in good standing, etc., without which he showed no right to continue to exercise the duties of the office, though his qualification and warrant might have been sufficient in the beginning. A plea setting up the resignation of the defendants, and the appointment and qualification of their successors, constitutes no answer to the information. If it did, it would be in the power of defendants in cases of this character, by successive resignations, to render the proceeding wholly ineffectual. Where the defendants resign, their successors stand, as to the unexpired term, in their shoes, and will be bound by the judgment.¹ It is sufficient for a plea of title to an office to state the authority for holding the election, that it was held, and that the defendant received the greatest number of votes for the office.²

¹ State v. McDaniel, 22 Ohio St. 354.

² People v. Van Cleve, Manning Mich. 362. The decision of the canvassers on the result of an election is conclusive in every form in which the question can arise, except that of a direct proceeding by *quo warranto* to try the right. "To hold it conclusive in this proceeding, would be nothing less than saying that the will of the electors, plainly expressed in the forms prescribed by law, may be defeated by the negligence, mistake, or fraud of those who are appointed to register the results of the election." People v. Vail, 20 Wend. 12, per BRONSON, J. In People v. Pease, 27 N. Y. 45, it was held that it was competent in an action to try the title to an office, to go behind the ballot-box and purge the return by proof that votes were received and counted which were cast by persons

not qualified to vote. In that case, no fraud or misconduct was imputed to the inspectors. The disputed votes had been received by them in good faith. The right of the persons offering them was not challenged at the time, and the return accurately stated the result of the election as shown by the count of the ballots. This case shows the disposition of the courts of New York, in election cases, "to look through the formal evidence of the right to the right itself, and to set aside the return of election officers when necessary to promote the ends of justice. Freedom of inquiry in investigating the title to office tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive for fraud or violence, by diminishing the chances that they prove successful in effecting the

R. claiming title to an office, stated that an election was duly held for the choice of a trustee, and that, of the votes received by the inspectors, H. had a greater number than himself, although a large number of votes were offered to be given for him, R., by qualified voters, which, had they been received, would have given him a number exceeding those given and received for H.; and that the votes so offered for him were rejected by the inspectors for a cause which was illegal. It was held that the foregoing concession was fatal to the claim that R. was chosen at the election.¹

An information alleged that the defendant had used, without any warrant, certain liberties, privileges, and franchises. The defendant answered by setting out a charter by which it was authorized to use the liberties, privileges, and franchises it was charged with usurping. It was held that this constituted a good *prima facie* defense to the information, the charter showing that the corporation was legally created, and the law presuming that it had performed all of its duties.² On a writ of *quo warranto* against a railroad company, commanding that the company be summoned to show by what authority it exercises the franchise of a corporation, it is proper for the answer to recite the several acts of the legislature which the defendant relies on as constituting it a legal corporation.³ The production of the corporate books, showing the election of the officers, is *prima facie* sufficient to prove that the previous requisites of the statute had been complied with.⁴ The answer may contain more than one defense.⁵ In Ohio, defendants in *quo warranto* proceedings have been allowed

objects for which they are usually employed." ANDREWS, J., in People v. Thacher, 55 N. Y. 525. See Kane v. People, 4 Nebraska, 509.

¹ People v. Phillips, 1 Denio, 388.

² Atty. Genl. v. Mich. State Bank, 2 Douglass Mich. 359.

³ State v. Miss., etc., R.R. Co., 20 Ark. 495.

⁴ Wood v. Jefferson County Bank, 9 Cowen, 193.

⁵ People v. Stratton, 28 Cal. 382.

to avail themselves of the benefit of the statute of that State which provides that the defendant in any action may "plead in any court of record, with leave of such court, as many several matters as he shall think necessary for his defense."¹

An information filed against a corporation by its corporate name, must be regarded as admitting the corporate existence of the defendant *de facto*, but not its right to exercise any other franchise specified in the information. When, therefore, the defendant pleads a charter regular on its face, it is competent for the relator to show by replication that the charter has been forfeited, or that it does not in fact or in law confer on the defendant the particular franchise in dispute.² The admission arising from the fact of the suit being brought against the defendant as a corporate body, thereby assuming it to be a legal entity, cannot be overcome by averments in the complaint that it has not acquired existence. The plaintiff, by the mere fact of suing by the corporate name, will be held to have admitted the performance by the defendant of all such acts as by the charter were conditions precedent to its entering upon a state of legal existence. All averments to the contrary will be regarded as irrelevant, and, on motion, be struck from the complaint, or disregarded on the trial.³ Where the affidavit of the relator, which was the founda-

¹ State v. Miami Exporting Co., 11 Ohio, 126; State v. Beecher, 16 Id. 358; State v. Cincinnati Gas Light Co., 18 Ohio St. 361; State v. McDaniel, 22 Id. 354. Double pleading was not allowable at common law; and as the proceeding by information in the nature of *quo warranto* was regarded in England as a criminal prosecution to punish the usurper by fine for the usurpation of the franchise, and to oust him or seize it for the crown, such proceeding was held not em- braced in the statute of 4 Anne, ch. 16, sec. 4, allowing defendants to plead more than one plea. Cole on Crim. Information, 112, 113, 129. The same view as to the nature of the proceeding was early taken in New York. People v. Manhattan Co., 9 Wend. 377; People v. Richardson, 4 Cowen, 113 note; People v. Jones, 18 Wend. 604.

² State v. Pennsylv., etc., Canal Co., 23 Ohio St. 121.

³ People v. Ravenswood, etc., Turnp., etc., Co., 20 Barb. 518.

tion of an information in the nature of *quo warranto*, charged the defendant as the Commercial Bank of Natchez, an incorporated bank of the State, the information and subpoena were of the same tenor, and the subsequent pleadings conformed in this respect to the affidavit and process, it was held that after these admissions, the corporate existence could not be questioned.¹ The defendant, in a proceeding by information in the nature of *quo warranto*, by demurring, does not waive the right to object that the proceeding cannot be maintained, an issue of fact not having been formed, or trial had.² Where the facts appear in the answer and rejoinder of the respondent, which the relator admits to be true, the court will discard all technical objections, as well as the one that the answer is not signed by the corporation to which, if exceptionable, the relator should have demurred.³ The existence, or the time of taking effect of a public act, cannot be put in issue or admitted or denied by the pleadings, but must be determined by the court.⁴ In New York, in an action in the nature of *quo warranto*, brought by the attorney-general, under the Code, to try the title of several claimants to a corporate office, the issues being strictly legal, the parties are entitled to a trial by jury, unless a jury is waived.⁵

Upon an information in the nature of *quo warranto* against a bridge corporation, evidence as to the way the bridge has been managed, how far it has accommodated the public wants, how far it is necessary to meet the future wants of the public, and how much the proprietors have received and expended, is proper.⁶

¹ Commercial Bank v. State, 6 Sm. & Marsh, 599.

defendant need not deny that he claimed the right to use and exercise them.

² People v. Whitcomb, 55 Ill. 172.

People v. Thompson, 16 Wend. 655.

³ German Ref. Church v. Com., 3 Barr Pa. 282. As the allegation of using and exercising the franchise and privileges of a corporation constitutes the gravamen of the charge, the de-

⁴ Atty. Genl. v. Foote, 11 Wis. 14.
⁵ People v. Albany, etc., R.R. Co., 57 N. Y. 161.

⁶ State v. Barron, 58 N. H. 370; 57 Id. 498.

§ 389. Judgment.—When the proceeding is against a corporation, and a conviction is had for misuser, or nonuser, or surrender, judgment of ouster and of dissolution should be rendered, which will be equivalent to a judgment of seizure at common law. But when individuals or a corporation are found guilty either of usurping or intruding into an office or franchise, or of unlawfully holding it, there should be judgment of ouster.¹ The distinction between a judgment of ouster and a judgment of seizure at common law, was well stated by Sir ROBERT SAWYER, in his argument in *Rex v. The City of London*.² He said that the rule was this: When it clearly appeared to the court that a liberty was usurped by wrong and upon no title, judgment of ouster only should be entered. But when it appeared that a liberty had been granted and had been misused, judgment of seizure into the king's hands should be given. The reason was: that which came from the king was returned by seizure; but that which never came from him, but was usurped, should be declared null and void. Judgment of ouster is rendered against individuals for assuming to be a corporation. It is rendered against a corporation for exercising a franchise not authorized by its charter. In such case the corporation is ousted of the franchise, but not of being a corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges.³

¹ *Rex v. Hertford*, 1 Ld. Raym. 426; *Rex v. Amery*, 2 Term Rep. 567; *Reg. v. Taylor*, 11 Ad. & E. 949; *People v. Bank of Hudson*, 6 Cowen, 217; *People v. Saratoga, etc.*, R.R. Co., 15 Wend. 113; *State v. Ashley*, 1 Ark. 304; *Smith v. State*, 21 Id. 294; *Com. v. Dearborn*, 15 Mass. 125; *State v. Central Ohio, etc.*, Assoc., 29 Ohio St. 399.

² 2 Term Rep. 522.

³ A non-performance of the conditions of the charter is deemed *per se* a

misuser which will forfeit the grant even at common law. "Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred, and the conditions enjoined upon them; they obtain the grant, and engage to perform the conditions; and when charged with a breach, there seems to be no reason

Where a cause of forfeiture is duly established, the court has no right to refuse to render judgment of ouster, on the ground that the continued existence of the corporation will be better for public or private interests.¹ Upon the default of the defendant, the court can only give judgment of ouster against him, his failure to appear not determining the right of the relator.² In an action in the nature of a *quo warranto*, a judgment in favor of the relator was reversed on appeal, it appearing that the defendant had a certificate from the board of canvassers that he was duly elected to the office of county surrogate, and had taken possession of the office. It was held that until there was a judgment in the case which declared the defendant wrongfully in possession of the certificate of election, and adjudged the relator the duly elected officer, the latter had no color of title to the office, and no right to occupy it; that by a reversal of the judgment as erroneous, he was put back where he was before the trial, when he could not have lawfully assumed to exercise the duties of the office.³ The court, in declaring who was elected, cannot give the same effect to votes offered but not received, as is to be given to those which were received by the judges of election. It can only oust the defendant from the office which he assumes to

against holding them accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent." "In further illustration of the sort of neglect of duties which are imposed by the grant of a franchise, or in other words, the misuser that will work a forfeiture, we may refer to a class of cases arising out of the forfeiture of offices. These cases are not all strictly analogous, because the duties enjoined are not so definite and accurately prescribed as in the case of corporations; but they will serve as illustrations. It is laid down as a general

principle, that if an officer acts contrary to the nature and duty of his office, or refuses to act at all, he forfeits it. For in every grant of an office there is an implied condition that the grantee will diligently and faithfully execute the duties of it." See opinion of NELSON, C. J., in *People v. Kingston, etc.*, Turnp. Co., 23 Wend. 193.

¹ *State v. Pennsylvania, etc., Canal Co.*, 23 Ohio St. 121.

² *People v. Connor*, 13 Mich. 238. See *Atty. Genl. v. Barstow*, 4 Wis. 567.

³ *People v. Livingston*, 80 N. Y. 66. See *Matter of Hebra, etc.*, 7 Hun, 333.

hold, and to which he has not been legally elected, and afford the persons whose votes were improperly rejected an opportunity to vote at another election.¹

When there has been misconduct either in usurping or unreasonably persisting in holding on to an office, it may be proper to award costs.² On informations at common law, the prosecution being in the name of the king, when there was no relator, the court could not give judgment that the defendant should pay costs.³ The statute of 9 Anne, ch. 20, which permitted an information in the nature of *quo warranto* to be brought with leave of the court at the relation of any person desiring to prosecute the same against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate, directed that the relator should pay or receive costs according to the event of the suit.⁴ In New York, before the adoption of the Code, costs in a proceeding by *quo warranto* went, of course, to the prevailing party;⁵ and this is so under the Code.⁶

An appeal of a *quo warranto* proceeding to dissolve a corporation taken on the suggestion of the relator, may be dismissed on the motion of the prosecuting officer against the relator's objection, who is not a party to the proceeding.⁷

¹ State v. McDaniel, 22 Ohio St. 354; Blizzard, L. R. 2, Q. B. 55; Com. v. Renner v. Bennett, 21 Id. 431; People v. Phillips, 1 Denio, 389.

⁴ 3 Blk. Com. 264.

² State v. Boston, etc., R.R. Co., 25 Vt. 445; State v. Bradford, 32 Id. 50.

⁵ People v. Loomis, 8 Wend. 396; People v. Adams, 9 Id. 464; People v. Ballou, 12 Id. 277; People v. Seaman, 5 Denio, 414. See State v. Cahawba, 30 Ala. 66.

³ Rex v. Williams, 1 Burr. 402; 1 Wm. Blk. 93; Rex v. Richardson, 9 East. 469; Rex v. Wallis, 5 Term Rep. 375; Rex v. Hall, 1 B. & C. 237; Rex v. McKay, 5 Id. 641; Reg. v.

⁶ People v. Clute, 52 N. Y. 576.

⁷ State v. Douglas County Road Co., 10 Oregon, 198.

CHAPTER XXIV.

WRIT OF MANDAMUS.

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§ 390. **Functions.**—In England, a mandamus has been said to be a high prerogative writ of a most extensively remedial nature, flowing from the king himself sitting in the Court of King's Bench superintending the police, and preserving the peace of the country. The purpose of it is to command the party to whom it is directed to do something it is supposed he is bound by his duty to do, which the applicant has a right to have done, and has no other specific means of compelling.¹ Its object is not to super-

¹ 3 Blk. Com. 110; 2 Kyd on Corp. v. Severn, etc., R.R. Co., 2 B. & A. 291; Rex v. Barker, 3 Burr. 1265; Rex 646.

sede legal remedies, but only to supply the defect of them. In this country the functions of the writ are substantially the same as in England, but in modern practice it is nothing more than an action at law between the parties. The right and power to issue the writ have ceased to depend on any prerogative power and it is now regarded as an ordinary process in cases to which it is applicable.¹ Every one is entitled to it when it is the appropriate process for asserting the right he claims, and it may be issued in behalf of corporations whenever a private person might, under the same circumstances, have invoked the aid of the court.² It may be employed "to compel the performance of any duties devolving by law upon any officer, body, or board acting in a public or *quasi* public character, in which proceeding, by a kind of fiction of law, the people of the State are considered to be personally present directing or instituting the proceeding which is carried on in their name."³

To authorize the writ against a private corporation or its officers or agents, there must be some specific duty owing the relator expressly imposed by the terms of the charter or necessarily arising from the nature of the privileges or obligations which it creates.⁴ A mandamus lies to all inferior tribunals, magistrates, and officers, and extends to all cases of neglect to perform a legal duty when there is no other adequate legal remedy. It applies to judicial as well as to ministerial acts. If judicial, the mandate will be to the officers to exercise their official discretion or judgment,

¹ People v. Corp. of New York, 3 Brewst. 596; City of Ottawa v. People, Johns. Cas. 79; People v. Stevens, 5 48 Ill. 240; Gilman v. Bassett, 33 Hill, 616; Fitch v. McDiarmid, 26 Ark. Conn. 298.

482; Am. Asylum v. Phoenix Bank, 4 Conn. 172; 10 Am. Decis. 112; Com. v. Pittsburg, 34 Pa. St. 496.

² Com. v. Dennison, 24 How. 66; Arberry v. Beavers, 6 Texas, 457; Commissioners v. Philadelphia, 3

³ 2 Potter on Corp. 759.

⁴ Rosenfield v. Einstein, 46 N. J. 479. The court is justified in refusing the writ when the relator fails to establish a right substantially as extensive as his claim. Ibid.

without any direction as to the manner in which it shall be done. If it be ministerial, the mandate will direct the specific act to be performed.¹ The writ has never been used simply as a preventive remedy, mandamus and injunction being entirely different in their nature. The former is a mandatory writ in a legal proceeding, commanding the performance of a specific affirmative act. The latter belongs to a court of equity, and usually issues to prevent the doing of some specific act. Hence, when the allegations of the petition are that the petitioner is in office exercising all of its duties and functions, and that the defendant has accepted an appointment to the same office, a mandamus will not be granted to restrain the latter from acting under the appointment.²

The proceeding by mandamus has all the elements of a suit, to wit: Mesne and final process, pleadings, and issues of law and fact formed and tried as in other cases. And it terminates in a judgment which is executed in the mode prescribed by law. This being so, it must be held to be an original proceeding having none of the features of final process.³ A mandamus is never awarded unless the right of the relator is clear and undenialable, and the party sought to be coerced bound to act.⁴

§ 391. Origin.—Writs of mandamus were issued at an early period, though in the books previous to the time of Lord Mansfield, the principles governing such proceedings, and the grounds on which they ought to be allowed, are not very satisfactorily stated. It is said that they were at first no more than letters, and that, for a time, disobedience to them was only a contempt.⁵ In the sixth of Ed-

¹ Williams v. County Commrs., 35 Me. 345. to an office. People v. Steele, 2 Barb. 397.

² Legg v. Mayor, etc., 42 Md. 203; Wakely v. Muscatine, 6 Wall. 481. It has been said that mandamus in its origin was a writ of restitution, and employed to restore or admit a person

³ McBane v. People, 50 Ill. 503.

⁴ People v. Hatch, 33 Ill. 9. See Hughes, *ex parte*, 114 U. S. 147.

⁵ 2 Kyd on Corp. 291.

ward the Second a mandamus was issued directed to the mayor and commonalty of Bristol commanding that "whereas they had deprived certain persons of the liberty of the city, they should restore them under pain of all that they could forfeit." In the reign of Henry the Sixth, a writ of the same kind was directed to the mayor of London.¹ In New York, the remedy was recognized at the adoption of the first State constitution in 1777, the Supreme Court taking all the powers in respect to it exercised by the King's Bench in England.²

§ 392. Only proper when there is no other remedy.—The invariable test by which the right of a party applying for the writ is determined, is to inquire first, whether he has a clear legal right, and if he has, second, whether there is any other adequate remedy to which he can resort to enforce his right. If he has another remedy, he cannot have a mandamus.³ The trustees of a church dispossessed the relator of a pew of which he claimed to hold the title. A mandamus being denied, the court said : "If he has a title to the pew in question, he has a specific remedy by an action at common law against the person who disturbs him in the enjoyment of his pew. Courts of justice have uniformly refused such applications where the party has another complete remedy, unless the remedy be extremely tedious."⁴ It was said by the court, in an early case in New York, that when an office in a municipal corporation

¹ 2 Kyd on Corp. 291.

² Potter on Corp., vol. 2, p. 759.

³ Asylum v. Phoenix Bank, 4 Conn. 172; Lynch, *ex parte*, 2 Hill, 45; People v. Thompson, 25 Barb. 73; People v. Judges of Branch, 1 Doug. Mich. 319; Oakes v. Hill, 8 Pick. 46.

⁴ Com. v. Rosseter, 2 Binney, 360. In People v. New York, 25 Wend. 680, the relator was appointed, under an act of the legislature, justice of one of the

courts of the city and county of New York, and he applied for a mandamus directing the mayor, aldermen, and commonalty of that city to order the comptroller to pay him his salary, which had been refused. The petition was denied, the relator having a perfect remedy by action. See People v. Thompson, 99 N. Y. 641; People v. O'Keefe, 100 Id. 572.

is already filled by a person who has been admitted and sworn and is in by color of right, a mandamus is never issued to admit another person; that the proper remedy in the first instance is by an information in the nature of *quo warranto*, by which the rights of the parties can be tried.¹ Some of the authorities are, however, the other way. In *Dew v. Judges, etc.*,² the relator applied for a mandamus to compel his admission to the office of clerk. It was objected that the office was already filled, and that the only remedy was a *quo warranto* against the incumbent. But the Court of Appeals of Virginia decided that mandamus was proper.³ The statute of Maryland of 1828 provided the remedy of mandamus for all cases of "intrusion or usurpation, or of any breach or violation of any terms, conditions, privileges, or franchises, or for unlawfully holding any office under any charter granted by the State."⁴ It was said by the court, in an early case in Massachusetts, that a *quo warranto* would not be granted directed to one holding the office of town clerk, when the decision could not be reached until after the term for which the incumbent claimed to be in had expired; that the proper remedy was for the successor to take the oath of office and demand of the former clerk the records, and, if they were refused, then to move for a mandamus to command him to deliver them.⁵ Although, when the petition for a mandamus is in the name and for the benefit of a claimant to an office against an actual incumbent, the parties will, as a rule, be left to a *quo warranto*, yet a mandamus may issue on the petition of a corporation against persons claiming to hold its offices.⁶

A court will not direct a writ of mandamus to the reg-

¹ *People v. New York*, 3 Johns. Cas. 79. See *People v. Stevens*, 5 Hill, 616. Petitioner, 20 Pick. 494; *State v. Kirkley*, 29 Md. 85.

² 3 Hen. & Munf. 1.

³ See opinion of court in *Strong*,

⁴ *Clayton v. Carey*, 4 Md. 26.

⁵ *Com. v. Athearn*, 3 Mass. 285.

⁶ *Am. R.R. Frog Co. v. Haven*, 101 Mass. 398.

ister of a land office commanding him to issue a final certificate of purchase. All violations of private right resulting from the acts of such officers, should be the subject of actions for damages, or to recover the specific property, according to the circumstances, in courts of competent jurisdiction.¹ A mandatory writ to compel the return of certain property was denied, as the value of the property could be recovered at law.² Where commissioners appointed by the legislature to assess damages to property by the laying out of a street in a village, reported their assessment in relation to the property of the relators, which report the trustees of the village refused to file in conformity with the statute, a peremptory mandamus was refused for the reason that, until the proceedings had progressed so far as to give mutual rights to the parties, the trustees had a discretion and might refuse to proceed, and if the relators had acquired a right to the money specifically assessed in their favor, an action of assumpsit would lie; or, if they had acquired any right by the report of the commissioners, and had sustained damages by the refusal of the trustees to perform their duty, an action on the case might be maintained to recover such damages.³ After the relator had changed his domicile to another county, he was assessed in the county from which he had removed for taxes on his personal property. The assessment roll was delivered to the board of supervisors, and by it to the collector, with the warrant annexed, commanding him to collect from the persons therein named the amounts set opposite their names as taxes. The relator refused to pay his tax, and the collector obtained it by seizing and selling his property. A peremptory mandamus having been granted, directed to the supervisors of the county, commanding them to cause the

¹ McCluny v. Silliman, 6 Wheat. 598; ² Rogers Locomotive Works v. Erie
McIntire v. Wood, 7 Cranch, 504. R.R. Co., 20 N. J. Eq. 379.

³ People v. Brooklyn, 1 Wend. 318.

claim of the relator to be audited and allowed, the proceeding was set aside on appeal, on the ground that the relator had a remedy by action against the assessors by whom he had been subjected to the payment of the illegal tax.¹ On a petition for a mandamus to compel the treasurer of a county to pay county bonds held by the relator, it appeared that the county commissioners had levied a tax to pay the bonds; that the treasurer had collected the money, but that the board of county commissioners had ordered him not to pay the bonds, and that he had consequently refused to do so. The writ was refused, the relator's remedy being an action against the treasurer and his bondsmen. The order of the county commissioners not to pay the bonds was beyond their authority, they having no more to do with such payment than anybody else. Whether or not it was the duty of the treasurer to pay them, would be determined in an action against him.² A county board of canvassers met after an election, and organized according to law. They then proceeded to determine who had been elected county officers, which determination was published, filed, and became matter of record, and the board was dissolved. It was held that even though their estimate of the votes was illegal, and the determination therefrom erroneous, a mandamus commanding the board to meet and correct the errors must be denied. Such a revision of the canvass would be wholly abortive. When the board having discharged, whether legally or not, the duties for which it was constituted was dissolved, it was incapable of reanimation. The relator had another and more efficacious remedy by *quo warranto*.³

¹ People v. Supervisors of Chenango County, 1 Kernan, 563.

² State v. McCrillus, 4 Kansas, 250. When there are funds in the hands of a county treasurer, out of which he is authorized to pay registered claims against the county, he becomes bound to pay them, and if he refuses to do so

on demand, a party to whom a claim is payable has a sufficient remedy at law, and is not entitled to mandamus. Ar- rington v. Van Houton, 44 Ala. 284; State v. Bridgman, 8 Kansas, 458.

³ People v. Supervisors of Greene County, 12 Barb. 217.

It is not a sufficient answer to an application for a mandamus that the party may have redress in a court of equity; for when the writ is refused because there is another specific remedy, such remedy must be at law.¹ But the rule is otherwise if the party asking for the writ has previously gone into a court of equity, and there instituted proceedings under which all the relief sought in the petition for mandamus may be obtained. This is in accordance with the rule that a party is not to be harassed by a multiplicity of suits.² When a court of equity has acquired jurisdiction in a suit for a purpose clearly within the province of the court, it may retain the bill for the purpose of ascertaining and enforcing all the rights of the parties properly involved in the subject-matter of the controversy, and the Supreme Court will not undertake to settle the questions involved in the suit by issuing a mandamus.³

It is not an objection to granting a mandamus that a party is liable to indictment, and may be punished criminally for omitting to do the act to compel the performance of which the writ is sought.⁴ A railroad company was re-

¹ A mandamus cannot be maintained when the right is merely equitable. *Regina v. Balby T. Road*, 16 Eng. L. & Eq. 276. Upon an application by the holders of unsecured bonds of a railroad company for a mandamus to compel a consolidated company, a successor of the former company, to give in exchange secured bonds which it had been proposed to issue to cover all the indebtedness of the various companies constituting the consolidation, it was held that the writ would not be awarded, especially after the property on which it was sought to obtain a lien had passed into the hands of others who were not parties to the proceeding; that if the relators had an equity in the premises, it might be enforced in a suit properly brought for that pur-

pose. *Ham v. Toledo, etc., R.R. Co.*, 29 Ohio St. 174.

² *Hardcastle v. Maryland, etc., R.R. Co.*, 32 Md. 32; *School Inspectors v. People*, 20 Ill. 525. See *People v. Chicago*, 53 Id. 424.

³ *Ibid.*

⁴ *People v. Troy, etc., R.R. Co.*, 37 How. Pr. 427. An obstruction of the sidewalk by buildings projecting into the street is a public nuisance, and where it does not appear from the statement of the relators that they have received special injury from it, entitling them to a civil remedy, or that it is any more injurious to them than it is to the inhabitants at large, a mandamus will not be granted, an indictment being exclusively the means to abate it. *Reading v. Com.*, 11 Pa. St. 196.

quired by its charter to construct and keep in repair a bridge of a specified width over a creek. The grand jury of the county found that the company in repairing the bridge had made it so much narrower as to be inconvenient and dangerous, and they presented it as a nuisance. Upon this presentment, the attorney-general, acting *ex officio*, moved for a mandamus to compel the company to comply with its charter. It was held that although the violation of a public duty is an offence which may be punished by indictment, yet if, as in this instance, it is also the violation of a duty the specific performance of which there is a right to enforce, a mandamus is at law the appropriate civil remedy in the absence of any other legal proceeding which can give it.¹ Although, as a general principle, a duty, though a public one, will not be enforced by mandamus if the party claiming the right to its performance can have recourse to any other adequate remedy. Yet the rule as now understood, and acted on by the courts, does not deny the writ if the remedy be not, in complete satisfaction, equivalent to a specific relief. Mandamus lies to compel an officer to perform the duties of his office, though he be liable to penalties, or to an action on the case for neglect of duty.² By inadequacy of remedy is meant not that it fails to accomplish the result desired, but that in its nature or character it is not fitted or adapted to the end in view. In *Rees v. Watertown*,³ execution on a judgment against the city of Watertown had been returned "no property found." Writs of mandamus had been issued requiring the levy of a tax to pay the judgment. These writs had failed by reason of resignations of the officers of the city to whom they were

¹ *State v. Wilmington Bridge Co.*, 3 *Harring. Del.* 312.

² *Buck v. Lockport*, 6 *Lansing*, 251; *Townsend v. McIver*, 2 *S. C.* 25. See *In re Trustees of Williamsburg*, 1 *Barb.* 34. When pending a motion for a new trial, no stay of proceedings has

been obtained, and the clerk of the court refuses to issue an execution for the enforcement of the judgment, a mandamus will be granted to compel him to do so. *People v. Loucks*, 28 *Cal.* 68.

³ 19 *Wall.* 107.

directed, and this had occurred several times. It was urged that the writ of mandamus having proved inadequate, a court of equity ought to furnish some other remedy. The court said : "We apprehend that there is some confusion in the plaintiff's proposition upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit of question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is no doubt the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case that he has issued such a writ on three different occasions; that by means of the aid afforded by the legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that in fact they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding. To illustrate. The writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in central New York combinations of settlers and tenants, disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually, that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime, its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost

no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.”¹

§ 393. The act required must be capable of performance, be obligatory, and involve substantial interests.—A mandamus presupposes the required act to be possible and obligatory when the writ issues. Generally speaking, the writ suggests facts showing the obligation and practicability of fulfilling what is commanded by it.² On a petition for a mandamus compelling a county to levy a tax on certain lands for the purpose of paying levee bonds held by the petitioner, the return stated that the county was not liable for the taxes, but that they could only be assessed and collected from lands in particular districts in unequal proportions and by a standard of valuation, and that as the original papers relating to levee matters had been destroyed, the defendants had no knowledge or information of the lands selected, and that they could not obtain such knowledge. It was held that if the petitioner would force a levy, he should aver and show that the respondents had or could acquire the information, or else he should by some means designate the particular lands liable to the assessment, because it was clear that a mandamus would not lie against officers requiring them to do what they could not possibly perform.³ An ordinance of a city provided that “the city marshal be required to procure at the cost of the city a suitable building for the purpose of a small-pox hospital, the selection to be subject to the approval of the committee on health and police ; that the said

¹ See Heine v. Levee Commissioners, 19 Wall. 665; s. c. 1 Woods, 246; State v. Railroad Tax Case, 92 U. S. 575; Barkley v. Levee Commissioners, 93 Id. 258; Merriwether v. Garrett, 102 Id. 472; Thompson v. Allen County, 115 U. S. 550.

² Reg. v. London, etc., R.R. Co., 6 Eng. L. & Eq. 220; Williams v. County Commrs., 35 Me. 345; State v. Perrine, 34 N. J. 254; People v. Supervisors of Westchester Co., 15 Barb. 607.

³ Ackerman v. Desha County, 27 Ark. 457.

marshal be further required to have removed without delay to said hospital any and all small-pox patients that may hereafter occur in this city." On a petition for a mandamus to compel the marshal to remove a small-pox patient from a certain thickly populated locality in the city, which he had refused to do, it was held that if the law enjoined upon the defendant the duty to remove every small-pox patient to some hospital in existence which was named in the petition, the writ would be issued ; but that as the common council had reserved to itself the approval of a building for a small-pox hospital, and it had not made a selection, the subject was beyond the control of the marshal, and a mandamus compelling him to act could not be granted.¹ Upon a petition for a mandamus to compel an entry-taker of land to receive an entry tendered by the relator, which the entry-taker had refused because the land had been previously entered by another, the court said that if the former entry was valid, it unquestionably appropriated the land, and no other entry could be legally made ; that the entry-taker had no power by virtue of his office to make void a valid entry without the consent of the enterer, and the court could not command him by mandamus to do that which without such command it would not have been lawful for him to do ; that the office of a mandamus was to enforce the performance of an official duty ; and that the court could not in the same case institute an inquiry into the equities of the parties, and give the relief which a court of chancery might afford.² So, on a petition for a mandamus to compel an entry-taker to receive an entry for land on a tract that had already been entered, such previous entry as petitioner claimed having been procured fraudulently, it was held that where it was even doubtful whether or not an entry was void a mandamus would not be granted to compel the entry-taker to re-

¹ Ball v. Lappius, 3 Oregon, 55.

² Gillespie v. Wood, 4 Humph. Tenn.

ceive another entry for the same land.¹ Under an act of the legislature a township voted pecuniary aid to a railroad company. The company complied with the conditions on which it was to receive the aid, but the township board refused to issue the securities, claiming that the act under which they were voted was unconstitutional. The court in refusing a mandamus to compel the delivery of the securities said : "The case before us is that of a private corporation demanding a gratuity which has been voted to it in township meeting. . . . I do not find that the meeting possessed any inherent authority to pass such a vote, or that any such authority could have been conferred upon it. The legislature could not confer upon the majority there convened, a jurisdiction to measure for the minority the demands upon their gratitude or liberality. . . . The authority exercised is not within the taxing power of the State."² A mandamus will not be granted compelling a corporation to issue shares of stock to the relator when it appears that a certificate for the shares has already been issued in good faith to another person under color of title in him ; nor when the rights of others, who are not parties to the proceeding, will thereby be materially affected.³

Although if the mayor of a city refuses to sign a contract made in pursuance of the charter and ordinances of the city, he may be compelled to do so by mandamus, yet the relator must clearly show not only that the defendant is bound in the discharge of his official duty to do the act in question, but that the right is such as the law ought to enforce. Hence if the contract which the relator desires to compel the mayor to sign has been made in violation of the city charter or ordinances, the writ will not be allowed.⁴ A per-

¹ Johnson v. Lucas, 11 Humph. 306.

² People v. Salem, 20 Mich. 452, per COOLEY, J.—GRAVES, J., dissenting.

³ Barker v. Marshall, 15 Minn. 177.

⁴ State v. Newark, 35 N. J. 396.

Although the court may direct a gas company to furnish gas to persons who under the provisions of the charter are entitled to it, and who offer to comply with the general conditions on which

emptory mandamus will not be issued to compel officials to do an act which a decree of another court has enjoined them from doing.¹ With respect to magistrates and officers having only public duties to perform, the courts will refuse to award a mandamus when the performance of the duty commanded will involve the officer in litigation the issue of which will be doubtful.² A public officer will not be compelled to perform an act which is not a duty clearly prescribed and enjoined by law; nor an act contrary to the provisions of a statute which is merely directory; nor will a practice in disregard of a former statute require the court to sanction and enforce by its direct action for that purpose a like disregard.³ Before further proceedings on a petition for a mandamus were had, the legislature passed an act which took away the functions of the respondents as canvassers of election, and as it followed that they could not be compelled to do what the law did not require of them, nor even to finish what they had commenced, the proceedings were dismissed.⁴

Upon an application for a mandamus to compel a railroad company to extend its line to a designated point, it appearing that neither the charter of the company nor the various acts in relation to it imposed upon the company a legal obligation to construct its entire line as claimed, but that forfeiture was only intended to follow the failure of the company to do so, the petition was denied.⁵ The

the company supplies others, yet a mandamus was denied to compel a company to deliver gas to the relator when he avowed his indebtedness to the company for gas previously furnished, and his inability to pay such indebtedness. *People v. Manhattan Gas Co.*, 45 Barb. 136.

¹ *Ohio, etc., R.R. Co. v. Commissioners*, 7 Ohio St. 278. Before the court will be warranted in compelling a ministerial officer to disregard an injunc-

tion, it must be satisfied that the ordering of the injunction was a mere act of usurpation. No court ought to compel either parties or ministerial officers to put themselves in conflict with the order or writ of another court. *Fleming, ex parte*, 4 Hill, 581.

² *State v. Perrine, supra*.

³ *Puckett v. White*, 22 Texas, 559.

⁴ *State v. Gibbs*, 13 Fla. 55.

⁵ *State v. Southern Minn. R.R. Co.*, 18 Minn. 40.

charter of a railroad company provided that three disinterested persons should determine whether the company had complied with the act of incorporation in locating its road so as not to obstruct, impede, or endanger the safety of the public in traveling on highways which its road intersected, and that if the road as located was approved by them, their decision should be final. It was held that after the appointees had reported affirmatively, with their approval, the matter was *res adjudicata*, and a mandamus would not be granted to compel the company to relocate its road, notwithstanding it appeared that, in consequence of increased population at a particular point on the road, and the additional number and speed of the trains, more persons were exposed to accident, and the danger was increased.¹

On the question of the right of the State to prosecute a writ of mandamus on account of the refusal or neglect of a railroad corporation to perform its duty as a common carrier, it appeared that a body of skilled freight handlers, acting in concert, fixed a price, and refused to work for less ; that the respondent refused to pay the price asked ; that the laborers then abandoned the work ; and that the respondent did not procure other laborers competent or sufficient in number to do the work. It was held that the court below had power to award the writ ; and that, upon the case presented, it was error to refuse it. The court said that if it had been shown that a "strike" of the skilled laborers of the corporation had been caused or compelled by some illegal combination or organized body which held an unlawful control of their actions, and sought through them to enforce its will upon the respondent, and that the

¹ *State v. New Haven, etc., Co.*, 45 Conn. 331. If the governor of a State refuses to discharge a duty, and there is no power delegated to the general government to employ any coercive

measures to compel him, a motion in the United States Supreme Court for a mandamus, must be overruled. *Kentucky v. Dennison*, 24 How. 66.

respondent, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in its power to employ other men adequate to do the work, a very different case for the exercise of the discretion of the court would have been presented.¹

The writ will not be issued to compel that which, if granted, cannot avail the party asking it;² especially where the matter in controversy is utterly insignificant in value.³ On a petition for a mandamus against the auditor of public accounts, to compel him to issue his warrant upon the State treasurer in favor of the relator for the sum of two dollars, the *per diem* allowance of the latter as a member of the legislature, the court said : “ The sum in this case being only two dollars, even if it were admitted to be just, I do not feel that justice would be promoted by entertaining jurisdiction, as substantial interests are not involved. It would be to encourage petty litigation at the expense of the State, and the delay of more important interests.”⁴

A mandamus will be refused irrespective of the legality or illegality of the acts of officers against whom it is petitioned, if the granting it will enlarge the corporate powers of the relator.⁵

§ 394. In case of contract.—Although the writ may be obtained to compel an officer to do his duty in enabling the petitioner to get his pay when the case is not controverted, and there is no remedy by action, yet purely contract obli-

¹ People v. N. Y. Cent. & Hudson River R.R. Co., 28 Hun, 543.

² Williams v. County Commrs., 35 Me. 345; Woodbury v. same, 40 Id. 304; State v. Kirkley, 29 Md. 85. A charter for a bank named certain persons as commissioners who, or a majority of them, should receive subscriptions to the stock. One of the commissioners, after accepting the appointment, refused to act in giving no-

tice. It was held that as the charter provided that a majority might act, the co-operation of this one was not necessary, and a mandamus would not be granted, compelling him. *In re White River Bank*, 23 Vt. 478.

³ Hall v. Crossman, 27 Vt. 297.

⁴ People v. Hatch, 33 Ill. 9.

⁵ Pennsylvania R.R. Co. v. Canal Commrs., 21 Pa. St. 9.

gations, involving no trust where the facts upon which the claim is based are disputed, cannot be enforced by mandamus.¹ A private citizen, holding an ordinary claim against a city or county, cannot have it adjudicated under a writ of mandamus. It must first be reduced to judgment, and if then the proper authority refuses to provide for its payment, the creditor may ask for mandatory process.²

§ 395. Voluntary associations.—Courts never interfere to control the enforcement of the discipline of merely voluntary associations, created for the advancement of religious, moral, or social principles, or for mere amusement. A body composed of those who have united for ecclesiastical relations and purposes, and spiritual improvement, is a voluntary association, with power to adopt its own rules of admission and discipline, and to administer them in its own way, independently of any control of the courts, while free from any intention to injure its members or those not belonging to it, and a mandamus will not be granted to restore a member to the spiritual privileges of the church.³ So, a petition for a mandamus to restore the relator to the rights and privileges of membership in the Chicago Board of Trade, which is a voluntary organization not maintained for the purpose of transacting business or for pecuniary gain, but simply to enforce among its members correct and high moral principles in their business relations, was denied.⁴ On a similar application made in an earlier case, it was held that the discretion vested in the board was not purely arbitrary, but could be exercised only for some just and reasonable cause germane to the objects for which the association was created; but that if the by-law under which the relator was expelled was found by the court to be rea-

¹ State v. Zanesville Turnp. Co., 16 Ohio St. 308; Ham v. Toledo R.R. Co., 29 Id. 174; People v. Green, 66 Barb. 630.

² Mansfield v. Fuller, 50 Mo. 338.

³ People v. St. Stephen's Church, 53 N. Y. 103.

⁴ People v. Board of Trade, 80 Ill. 134.

sonable and just, the petition would not be entertained.¹ The College of Physicians and Surgeons, in the city of Louisville, though an incorporated body, is a private corporation, and its officers not being in any sense executive or ministerial, they cannot be reached by mandamus under the civil code of practice of Kentucky.² A railroad company, though in one sense a public corporation, has power to make its own regulations in respect to the running of its trains, and stopping them on the line of its road, and when such regulations are reasonable, the court will not interfere by mandamus to compel the company to change them.³

§ 396. How far action of courts controlled.—A mandamus may be granted to a subordinate court when, having jurisdiction, it refuses to hear and decide the controversy, or when, having heard the cause, it refuses to render judgment or enter a decree in the case. But the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued if the party aggrieved may have a remedy by writ of error or appeal. The only office of the writ when issued to a subordinate court, is to direct the performance of a ministerial duty, or to command the court to act in a case when the court has jurisdiction and refuses to do so. The supervisory court will never prescribe what the decision of the subordinate court shall be, nor interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.⁴ Where county commissioners, in refusing to abate

¹ People v. Board of Trade, 45 Ill. 112.

² Cook v. College of Physicians, 9 Bush. 541.

³ People v. Long Island R.R. Co., 31 Hun, 125. A petition for a mandamus to compel the judge of a circuit court to grant an injunction was de-

nied, the issuing of an injunction not being a ministerial but a judicial act. McMillan v. Smith, 26 Ark. 613; Hays, *ex parte*, Ib. 510.

⁴ Newman, *ex parte*, 14 Wall. 152; Appling v. Bailey, 44 Ala. 333; Smith v. Jackson, 1 Paine C. C. 453.

taxes, which it is claimed have been overrated, act judicially, a mandamus will not be granted compelling them to make the abatement; but the writ will be issued if they refuse to hear and determine the complaint.¹ When county commissioners are authorized in laying out a highway of general use to the public, to order and direct, if they see fit, that a portion of the expense of making the same shall be paid by the county, this is a judicial power which the commissioners are bound to exercise, and if they improperly refuse to take cognizance of a case regularly before them, they may be compelled by mandamus to do so; but not to revise their decision.² When a statute provides that the board of supervisors shall pass upon the fairness of an assessment of damages against the county, all that a court can do if the board refuses to act is to issue a mandamus compelling it to proceed and exercise the discretion and powers conferred upon it by the act. A writ commanding the board to cause a specified sum to be levied and collected as damages in such a case, will be refused.³ The petitioner asked for a peremptory mandamus commanding the board of police of a county to issue its warrant upon the treasurer of the county directing him to pay the petitioner the amount of his claim against the county. The board of police was recognized for all the purposes connected with an adjudication on such a claim as a court from which an appeal might be taken. It was held that if the claim was still open, a mandamus was the proper remedy to compel the board to proceed to render a judgment, but not to direct what judgment should be given; and that if there was no money in the treasury, a mandamus would be granted to

¹ Gibbs v. Commissioners, 19 Pick. 298.

² *In re Inhabitants of Ipswich*, 24 Pick. 343. Where county commissioners refused to allow costs in a case in which the statute was not clear on

the subject of costs, their decision was held to be judicial, and not within the province of a mandamus. Chase v. Blackstone Canal Co., 10 Pick. 244.

³ People v. Supervisors of Westchester Co., 12 Barb. 446.

coerce the levy of a tax.¹ A sheriff presented to the comptroller of the State a bill against the State for fees, and demanded payment, which the comptroller refused. By the statute the comptroller was directed to decide as to the justice or legality of such a claim. It was held that a mandamus could not be granted compelling the comptroller to decide in favor of the sheriff's account.² Where the statute contemplated that the action of a town council sitting as a board of canvassers should be judicial, and no irregularity in its proceedings was shown, a mandamus was refused.³ Under an act providing for the location and maintenance of a park a mandamus was granted on the application of the commissioners of the park to compel the judge of the circuit court of the county to appoint commissioners to fix the compensation and assess the damages to be paid the owners of the lands about to be taken by the relators for the park.⁴ The duty of approving the bonds of a county officer being in the nature of a judicial act requiring the exercise of judgment and discretion, a mandamus will not be issued to control the performance of it.⁵ As it is the province of the writ to compel inferior courts to go forward in the discharge of their constitutional duties in cases where they either neglect or refuse to do so, if there is no such showing as could have called for or authorized the court to exercise its discretion in respect to the propriety of a continuance, a mandamus will be granted commanding the court to set aside its order continuing the cause, and proceed with the trial.⁶

A superior court may interfere by mandamus in cases where the court below has acted contrary to, or in disre-

¹ Board of Police v. Grant, 9 Smedes & Marsh, 77.

² Towle v. State, 3 Fla. 202.

³ Weeden v. Town Council, 9 R. I. 128.

⁴ People v. Williams, 51 Ill. 57.

⁵ Swan v. Gray, 44 Miss. 393.

⁶ Dixon v. Field, 10 Ark. 243. In Alabama it was held that a superior court had no power to interfere in such a case, unless perhaps when the discretion of the court below had been corruptly exercised. Ala. R.R. Co., *ex parte*, 44 Ala. 654.

gard of, its own rules, or has evidently misapplied them to the case; but never when the course pursued below was purely in the discretion of the court, and it acted in perfect consistency with its established practice.¹ It is within the jurisdiction of a superior court to grant a writ of mandamus to compel a judge of an inferior court to sign a bill of exceptions in a case before him, but not to sign a particular one; for the judge before whom the trial is had must determine for himself as to the accuracy of the bill presented to him for his signature.² When a court may legally entertain a motion to set aside a judgment, an appellate court will not interfere by mandamus, though in its opinion the order made by the court below was clearly erroneous.³

§ 397. Discretionary powers not interfered with by mandamus.—When a corporate body is vested with discretionary powers in the performance of its duties, courts will not attempt to control their exercise except in a clear case of a violation of law.⁴ In general it is only ministerial acts in the performance of which no exercise of judgment or discretion is required, that a rule for a mandamus will be granted.⁵ A statute gave a board of fire commissioners power to appoint a chief of the fire department, and provided that incompetency, inefficiency, permanent disability,

¹ Wells v. Stackhouse, 2 Harr. (17 N. J.) 355.

² People v. Jameson, 40 Ill. 93. A declaration of the judge of the court below that he would not sign a bill of exceptions in the case, was held conclusive, the only remedy of the petitioner being a mandamus to compel him. State v. Hall, 3 Coldw. Tenn. 255.

³ Goolsby, *ex parte*, 2 Gratt. 575. See People v. Judge, etc., 24 Mich. 408.

⁴ School Inspectors v. People, 20 Ill. 525. Although when the legislature has given the municipal authorities of cities and towns power to license tav-

erns, coffee-houses, and places in which spirituous liquors may be sold, it is left to their discretion to grant or refuse a license in a particular case, and a mandamus will not lie to compel them to grant it; yet this discretion is not arbitrary, and if they refuse to grant any licenses, they may be compelled to act. Louisville v. Kean, 18 B. Mon. 9.

⁵ Decatur v. Paulding, 14 Pet. 497; U. S. v. Guthrie, 17 How. 284; U. S. v. Commissioners, 5 Wall. 563; Litchfield v. Register and Receiver, 9 Id. 575; Carrick v. Lamar, 116 U. S. 423.

insubordination, or violation of any of the rules and regulations of the board, should be deemed cause for suspension or dismissal. It was held that the board was clothed with discretionary power in the trial and removal of members of the department, and that having in the exercise of its discretion removed the relator, the court would not compel it by mandamus to restore him.¹ An act of the legislature provided for issuing bonds of the State, and constituted a board of liquidation which was authorized to sell the bonds at not less than seventy-two dollars on the hundred. It was further provided that if at the expiration of thirty days from the passage of the act the board had not sold the bonds, it was authorized to exchange them at the rate of one hundred dollars in bonds for each and every seventy-two dollars of all outstanding evidences of indebtedness against the State. It was held that as it was discretionary with the board of liquidation whether or not it would exchange bonds for evidences of indebtedness at the rate named, a mandamus would not be granted to compel it, in any particular instance, to make the exchange.² Where it is the duty of county commissioners to determine when public convenience requires that a road shall be laid out in the county, a mandamus compelling them to lay out a particular road will be refused.³ So, where the statute provides that the commissioners of highways may cause all roads located by them to be constructed and finished in such manner as will best promote the public interest, their acceptance of a road is conclusive evidence of its sufficiency, and a mandamus will not be granted commanding

¹ *State v. Board of Fire Commissioners*, 26 Ohio St. 24. When a statute provides that contracts for supplies shall be awarded to the lowest responsible bidder, the word "responsible" does not mean pecuniary ability alone, and if the officers having charge of the

matter act in good faith, mandamus will not lie to compel them to change their decision. *Douglass v. Com.*, 108 Pa. St. 559. See *Deehan v. Johnson*, 141 Mass. 647.

² *State v. Warmoth*, 23 La. Ann. 76.

³ *Hill v. County Commrs.*, 4 Gray, 414.

them to make the road better.¹ Where it was provided by law that all contracts should be conditioned to keep the roads and bridges of a town in repair to the acceptance of the superintendent of highways, and that his directions and decisions should be conclusive on the parties, it was held that the court below erred in granting a peremptory mandamus compelling the superintendent to issue a certificate that a certain road had been kept in good repair.² By an act of the legislature the defendants were appointed commissioners to select a site for a permanent seat of justice in a county to be located as near the centre of the county as a suitable location could be obtained. The commissioners having stated in their return that they had performed their duty with a strict and conscientious regard to the requirements of the act, a mandamus to compel them to adopt a different site from the one selected was refused.³ Where an act provides that alterations may be made in the charter of a religious corporation upon its application for that purpose, the court will not, upon the petition of individual members of the society, grant a mandamus compelling the board of trustees to make such an application contrary to its own judgment; the individual members of a religious society not constituting the corporation, but the board of trustees, in which the corporate rights are vested.⁴ When the statute is not mandatory with reference to the doing of certain acts, but leaves it optional, merely providing that when the acts are done, it must be within a specified time and in a particular manner, a mandamus will not be granted to compel performance.⁵

§ 398. Mandamus not a writ of right.—A court is not obliged to issue the writ in all cases when it has the requi-

¹ Rice v. Commissioners of Middlesex, 13 Pick. 225.

⁴ Com. v. Trustees of St. Mary's Church, 6 Serg. & Rawle, 508.

² Seymour v. Ely, 37 Conn. 103.

⁵ State v. Police Jury, 22 La. Ann.

³ State v. Bonner, Busbee N. C. 257. 611.

site power, but may exercise its discretion as well in refusing as in granting it.¹ When the end of a mandamus is merely a private right, and obedience to it will be attended with manifest hardships and difficulties, the writ may be so worded as to be without prejudice to the adverse parties in any future litigation.²

§ 399. Delay in making application.—Although there be no statutory limitation of the time within which a mandamus may be obtained, yet the court will take into consideration any damages or inconveniences which might result from the lapse of time should the application prevail.³ The petition will not be granted after considerable delay by the petitioner, especially if other interests have arisen which would be affected by the proceeding. But a reasonable delay will not be deemed a sufficient ground for refusing the writ.⁴ A petition of the members of a church charged that certain persons had intruded into the offices of trustees and elders, and prayed that the rightful incumbents might be restored and a mandamus be issued for that purpose. The charter provided that four elders and four trustees should be annually elected; that the elders and trustees for the time being should, at least eight days before the election, nominate double the number of those required; that the minister should give notice of the meeting for the election the Sunday preceding; and that, in case of a vacancy in the office of elder or trustee, notice of an election to fill such vacancy should be given by the minister a reasonable time before. The petition was made several years after an election which it was claimed was irregular. It

¹ *Rex v. Commrs. of Excise*, 2 Term Rep. 381; *Rioters' Case*, 1 *Vernon*, 175; *Williams v. County Commissioners*, 35 *Me.* 345; *Woodbury v. same*, 40 *Id.* 304; *State v. Kirkley*, 29 *Md.* 85; *People v. Supervisors of West-*

² *Van Rensselaer v. Sheriff of Albany*, 1 *Cowen*, 501.

³ There was no limitation of the time in England previous to the 32d of Geo. 3d, ch. 58.

⁴ *People v. Supervisors of Westchester County*, *supra*; *Savannah v. State*, 4 *Ga.* 26.

was held that if that election was irregular, those who acted under it as trustees and elders were in *colore officii*, and their acts were binding; hence, that the calls for the subsequent elections were regular and lawful, and the application for a mandamus came too late.¹

§ 400. When in general a mandamus will be granted.—The objections to proceeding against State officers by mandamus or injunction are: first, that it is in effect proceeding against the State itself; and second, that it interferes with the official discretion vested in the officers. A State cannot, without its consent, be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But when a plain duty requiring no official discretion is to be performed, and performance is refused, any person who will sustain personal injury by such neglect may have a mandamus to compel performance; and when a violation of such duty is threatened by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ.² Where the duty of the State auditor is wholly ministerial, consisting of auditing accounts and issuing his warrant for the amount, with no discretion on his part, mandamus will lie, and is the proper remedy, if the petitioner is in fact entitled to the sum claimed, and

¹ Smith v. Erb, 4 Gill, 437. When the time for compulsorily taking land by a railroad company has expired, the court will not issue a mandamus to the company compelling it to take the land. Reg. v. Liverpool, etc., R.R. Co., 11 Eng. L. & Eq. 408.

² Board of Liquidation v. McComb, 2 Otto (92 U. S.) 531. See Louisiana v. Jumel, 107 U. S. 711.

payment has been refused.¹ So, a peremptory writ will be issued in favor of a banking institution which has complied with the requirements of a general banking law, compelling the auditor of the State to issue to the institution bank bills for its circulation as provided by the statute.²

A mandamus will be granted, compelling canvassers of election to give a certificate of the result as appears from the returns in their possession to be recorded in the office of the secretary of state.³ Under a statute prescribing the duty of a board of examiners to inspect the returns of an election for county commissioners, to ascertain if any persons had a majority of all the ballots returned, and, if so, to give them a written notice of their election, it was held that if the examiners refused to give notice to one or more of the persons found to be duly elected, a mandamus would be granted, compelling them to perform their duty in that respect, even though they had given notice that other persons were elected who had already been sworn into office.⁴ The foregoing not being a petition that the relator be admitted to office, his obtaining the writ would not necessarily oust the incumbent, or give the relator possession of the office. He might, for these purposes, have to resort to a *quo warranto*, and possibly before he could get qualified, to another mandamus. The court said: "Two processes may be necessary to enable the petitioner to get possession of the office: the one to establish the legality of his own election, the other to set aside that of the incumbent. They are independent of each other. Both might have been applied for at the same time, and proceeded *pari passu*. Had the petitioner first caused the incumbent to be removed by a *quo warranto*, still, without evidence of his own election, he could not enter into the office. So, if

¹ Page v. Hardin, 8 B. Mon. 648; Black v. Auditor, 26 Ark. 237.

² Citizens' Bank v. Wright, 6 Ohio St. 318.

³ State v. Gibbs, 13 Fla. 55.

⁴ Strong, Petitioner, 20 Pick. 484.

a mandamus be now issued and complied with, he may still be obliged to resort to other legal proceedings before he can get regularly inducted."¹

When the charter of a city gives the common council power to hire property for the use of the city, and to authorize the controller to take a lease and execute it in behalf of the city, the return of the controller to an alternative mandamus, that there has been no appropriation to pay the rent, will be quashed, and a peremptory writ awarded.²

An act of the legislature which contains a pledge of the public faith to railroad companies that they shall receive a grant of land from the public domain for constructing railroads contemplated by their charters, has the sanctity of a contract between the State and the companies, and if the land commissioner refuses to issue land certificates to a railroad company which has acquired a right to them under the act, a mandamus will be granted to compel him to do so. In this case the court said: "It is the duty of the commissioner to know the facts before he issues the certificates; but it would be asking too much of him to determine the validity of the law, and it would impose on him a judicial duty which the law reposes elsewhere. The prerequisite conditions on the part of the company being complied with, the duty of the commissioner is made plain by the law, and he has no other guide in the exercise of his duty than the law itself; it is to him the declared will of a higher authority. It cannot be claimed that the State could, in violation of a plain and obvious right, assert that because she holds the sovereignty of the soil, she would be justified in withholding from individuals the title to lands which she had fairly and honestly contracted away."³

¹ See *Rex v. York*, 4 Term Rep. 699; ⁵ *Id. 66.* Coal & Navigation Co.'s Appeal, 112 Pa. St. 360.

² *People v. Green*, 64 N. Y. 499. See *Savannah v. State*, 4 Ga. 26; *Lehigh* ³ *Houston, etc., R.R. Co. v. Commissioner*, 36 Texas, 382, OGDEN, J., dissenting.

When the legislature imposes upon the board of supervisors of a county the duty of subscribing to the stock of a railroad company, a mandamus will be granted on the petition of the company, compelling the board to subscribe.¹ A county subscribed to the stock of a railroad company, under an act of the legislature which was constitutional, and the county commissioners, in pursuance of the law, elected to deliver the bonds of the county to the company in payment of the subscription. The commissioners having afterward refused to deliver the bonds, without showing any cause for such refusal, excepting that the law was of doubtful constitutionality, it was held that a mandamus was the proper remedy to enforce the delivery.² If, however, the writ is prayed for to prevent an act which is forbidden by the constitution, it will be issued. An application was made for a mandamus, to compel the respondent to deliver to the proper authorities of a city certain bonds which had been issued and deposited in the respondent's office in aid of a railroad company, in the construction of its road, under an act to enable any city to pledge its aid for such a purpose, the city desiring a return of the bonds and having demanded them. The writ was granted as prayed, on the ground that the constitution precluded the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens, or upon any portion of them, in aid of the construction of railroads, and that the bonds were therefore unauthorized.³

Where an act provides that whenever an estimate of expenditures shall be presented to the board of supervisors, it shall be the duty of the board to issue, and cause to be executed, the bonds of the county for one-third of the estimate, the board acts ministerially in the issuance of the

¹ Napa Valley R.R. Co. v. Napa County, 30 Cal. 435.

² Cincinnati, etc., R.R. Co. v. Clinton County, 1 Ohio St. 77.

³ Bay City v. State Treasurer, 23 Mich. 499, following People v. Salem,

20 Id. 452.

bonds, and if it improperly refuses to issue them, a mandamus will be granted. The basis for the amount of the bonds to be issued, is the expenditure as determined in the estimate presented, and not the actual value of the work done. If the expenditure was not made, or fraud has been committed in the contracts, this may be a good defense.¹ A registration law provided that the registrars should, as soon as possible, deposit with the county clerk the original books of registration, which should be kept and preserved among the records of the county. It was held, that when a registrar refused obedience to the law, without giving the court any reason for such refusal, a mandamus would be issued after a reasonable time, compelling him to do it.²

When private rights have been invaded by the State in the construction of a public improvement, and commissioners appointed to appraise the damages have refused to discharge their duty, a peremptory mandamus will be granted compelling them to do so, they being required to determine to whom the property belongs as well as the amount to which each is entitled.³ The relators' land being flooded in consequence of a dam built across a river to feed a canal, they appeared before a board of three appraisers appointed by the legislature and claimed damages. One of the appraisers dissenting and refusing to act, the other two certified the damages which in their judgment the relators had sustained. The relators, upon this certificate, demanded payment from the canal commissioners, whose duty it was to pay such damages, which they refused to do. It was held that this not being a case of private arbitration, where the judges are chosen by the parties, the decision of a majority of the appraisers was valid, and a peremptory mandamus was issued commanding the canal commissioners to pay the amount of damages as assessed.⁴ A party petitioned

¹ California, etc., R.R. Co. v. Butte County, 18 Cal. 671.

² Jennings, *ex parte*, 6 Cowen, 518.

³ McDiamicid v. Fitch, 27 Ark. 106.

⁴ Rogers, *ex parte*, 7 Cowen, 526.

the board of trustees of a canal company to have his damages assessed for injury occasioned by taking his land. This was done by appraisers appointed for the purpose, but the trustees refused to certify the case to the court. A rule was granted that they send up the papers, or show cause why they refused. On the return the court ordered a mandamus to issue, which was affirmed on appeal.¹ When it is the duty of a township committee to raise money and pay the damages assessed to landowners by reason of a highway being laid out through their land, a mandamus will be granted compelling the committee to act, so that the road can be opened.² A mandamus was awarded commanding an overseer of highways to open, clear out, and make a road within the limit and division assigned him by the township committee.³

It is the duty of chartered companies to carry out the objects for which they are created, and they can be compelled to do so by mandamus—such as the repair of public highways and the furnishing of railroads with suitable cars,

¹ Wabash, etc., Canal Co. v. Johnson, 2 Ind. 219.

² Minhannah v. Haines, 29 N. J. 388. A statute provided that where a county subscribed to the stock of a railroad company to be paid for by levying a tax, when the railroad collector received the tax he should give the person paying it a certificate showing the amount, which certificate should be received in payment of either freight or passage on any railroad on which such subscription might have been expended. A railroad company having refused to receive from a passenger such a certificate in payment for a ticket for passage over its road, it was held that mandamus was the proper remedy to compel the receipt. Mobile, etc., R.R. Co. v. Wisdom, 5 Heisk. Tenn. 125. A railroad company gave notice to a

landowner on the intended line of road that within a time named it would require his land. The landowner served the company with a notice to treat, and demanded that the amount of compensation should be determined by a jury, but no further steps were taken to complete the purchase until after the expiration of the period specified by the company for the exercise of its power to take the land. It was held that notwithstanding the lapse of time the company might be compelled by mandamus on the application of the landowner to issue its warrant to the sheriff to summon a jury to assess the amount of compensation. Birmingham, etc., R.R. Co. v. Reg., 15 Q. B. 647, n.; aff'd 14 Eng. L. & Eq. 276.

³ State v. Holliday, 3 Halst. 205.

engines, and attendants, without which they cannot be properly used.¹ It was justly remarked by the Supreme Court of Maine that railroad companies being creatures of the law intrusted with the exercise of sovereign powers to subserve public necessities and uses, they are bound to conduct their affairs in furtherance of the public objects for which they are called into being.² In a late case in New York it was held that the fact that individuals who had sustained injury in consequence of the abandonment of work by freight handlers were entitled to an action for damages, did not deprive the State of its remedy by mandamus or excuse a railroad company from forwarding freight. Davis, C. J., in delivering the opinion of the court, said : "As bodies corporate, their ownership may be and usually is altogether private, belonging to the holders of their capital stock, and their management may be vested in such officers or agents as the stockholders and directors under the provisions of the law may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantage of the corporators. But these considerations are in no sense in conflict with their obligations and duties to the public. The objects of their creation are from their very nature largely different from those of private and trading corporations. Railroads are in every essential quality public highways, created for public use, but permitted to be owned, controlled, and managed by private persons. But for this quality the railroads of the respondent could not lawfully exist. Their construction depended on the right of eminent domain, which belongs to the State in its corporate capacity alone, and cannot be

¹ State v. Hartford, etc., R.R. Co., 29 Conn. 538. See State v. Paterson, etc., R.R. Co., 43 N. J. 505; Union Pacific R.R. Co. v. Hall, 91 U. S. 343; State v. Dayton, etc., R.R. Co., 36 Ohio St. 434; State v. Telephone Co., Ibid. 296; People v. Manhattan Gas Light Co., 45 Barb. 136; Pittsburg, etc., R.R. Co. v. Com., 104 Pa. St. 583.

² Railroad Commrs. v. Portland, etc., R.R. Co., 63 Me. 269.

conferred except upon a public use. . . . We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers, and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit, and also upon the contract between the corporation and the State expressed in its charter or implied by the acceptance of the franchises, and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed by the legislature, for adequate reasons in this special instance, into a corporate franchise to be exercised solely by a corporate body for the public benefit to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee."¹ Where a railroad company which is authorized to construct its track along or upon a highway is required to restore the highway as far as possible to its former condition, and the acquisition of other land is necessary for that purpose, as the law gives ample power to take compulsorily the land thus needed, if the company fails with reference to the complete restoration of the highway, a mandamus, which shall direct the company what to do, may be issued to compel the performance of the omitted duty.² A mandamus will lie on the relation of a city to compel a railroad company

¹ People v. N. Y. Central & Hudson River R.R. Co., 28 Hun, 543. See State v. Paterson, etc., R.R. Co., 43 N. J. 505; Chicago, etc., R.R. Co. v. Crane, 113 U. S. 424.

² N. Y. Cent., etc., R.R. Co. v. People, 12 Hun, 195; aff'd 74 N. Y. 302. See People v. Dutchess, etc., P. R. Co., 58 N. Y. 152. Where a statute author-

izes a railroad company whenever its road shall cross a highway to carry the highway over or under the track, or on the grade, "as may be found most expedient," the election is with the company, and, when exercised in good faith, it is not reviewable. N. Y. Cent., etc., R.R. Co. v. People, *supra*.

to grade, bridge, or otherwise make conveniently passable streets on which the company has laid its track.¹ Where a statute provides that bridges laid out or being within the bounds of any town shall be kept in repair by such town, the town is primarily liable in case such a bridge is out of repair. But this statute does not discharge railroad corporations or other parties who by statute or in any other way are required to maintain and repair bridges from their liability to do so, nor leave the towns without a remedy. They may compel railroad corporations to keep in repair such bridges as the law requires them to maintain. A railroad where it intersected a highway was constructed forty-five feet below the surface. At the place of crossing the company built a bridge for the use of the traveling public. Afterward the track of the railroad was disused and demolished, and, in course of time, the bridge becoming dangerous from want of repair, it was taken down by the superintendent of the railroad company. It was held that the obligation to keep the bridge in repair was implied from the authority to construct it, and a mandamus was granted against the company commanding it to rebuild, maintain, and keep the bridge in repair.² A canal crossing a public or even a private road may be a nuisance, and a mandamus is the proper remedy to abate the nuisance by compelling the company to bridge the canal at the intersection.³ A private corporation having, under the provisions of its charter, constructed a canal which crossed one of the streets of a city, a peremptory mandamus was granted compelling the corporation to erect a suitable bridge over the canal at the place of intersection

¹ Indianapolis, etc., R. R. Co. v. State, 37 Ind. 489. Where an act authorizing the erection of two bridges provided that when constructed they should be maintained and repaired, and, if pivot bridges, be opened for the passage of boats, the duty thus distinctly imposed if neglected may be enforced by mandamus. City of Ottawa v. People, 48 Ill. 233.

² Ibid.

³ Habersham v. Savannah, etc., Canal Co., 26 Ga. 665.

with the street. The court observed that it had been repeatedly held in England that where a private corporation had, in the prosecution of its own objects, rendered a bridge necessary in a public highway where none was necessary before, it was its duty, and not the duty of the county, to erect and maintain such bridge, and that a mandamus would be issued when the public interest required an immediate remedy.¹ A mandamus is appropriate to compel a railroad company to pursue the mode prescribed by its charter in crossing rivers and other watercourses.²

With reference to the remedy when a railroad is removed and discontinued, a railroad company, having constructed its road, afterward abandoned a portion of it, and was taking up and removing the rails, when the attorney-general brought a suit praying that an injunction might be granted restraining the company, and that it might be specifically required to reopen and operate that portion of its road. It was held that the people could not maintain a suit to compel a railroad company to operate its road for the use of the public after it had abandoned it for reasons of its own ; that the remedy was not by a suit in equity for a specific performance, but by mandamus, or indictment, or, at the election of the people, by proceedings to annul the existence of the corporation.³ In England, such a company constructed a railroad between certain termini, as authorized by its charter. It subsequently built a branch road from an intermediate point on the main line, and then abandoned a portion of the original line from that point to one of the termini, and rendered such abandoned portion impassable by taking up the rails for some distance. A mandamus was issued compelling the company to reinstate the portion of the road so abandoned.⁴ The relators, own-

¹ *In re Trenton Water Power Co.*,
20 N. J. 659.

² *State v. Northeastern R.R. Co.*, 9
Rich. 247.

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³ *People v. Albany, etc., R.R. Co.*,
24 N. Y. 261.

⁴ *Rex v. Severn, etc., R.R. Co.*, 2 B.
& A. 646. See *Union Pacific R.R.*

ers of a grain elevator, sought by mandamus to compel a railroad company to deliver whatever grain in bulk on the line of its road might be consigned to them at their elevator. The respondent owned and operated several separate and distinct lines of road designated by divisions. There appearing to be no other adequate remedy, it was held that the writ would be granted as to those divisions upon which it could be fairly claimed the elevator was situated, notwithstanding the fact that the company had contracted with the owners of certain other elevators for the exclusive delivery of grain in bulk to them to the extent of the capacity of their elevators, such contracts, so far from excusing the company, only showing that the policy of delivering grain exclusively at its chosen warehouses was a deliberate policy, to be followed for a term of years during which these contracts were to run; but that with reference to the other divisions of the road, a delivery would

Co. v. Hall, 91 U. S. 343. In England, a railroad company having been chartered by act of Parliament to construct a road between specified termini, built and operated a portion of the line, and taken land from private owners for the use of the road, a mandamus was issued compelling the completion of the line between the termini named, on the ground that when a company had obtained power to make a long line of railroad, it could not at its pleasure construct parts of it which were profitable, and abandon the rest. Reg. v. York, etc., R.R. Co., 16 Eng. L. & Eq. 299, CAMPBELL and COMPTON, JJ., for the writ, ERLE, J., dissenting. This case being carried to the Exchequer Chamber, was reversed. 18 Eng. L. & Eq. 199. The court said that although the termini were originally intended to be certain designated points, it was plain that the legislature contemplated the possibility of the line being aban-

doned, or being only partially made; that an option was therefore given to the company; and as the company had *bona fide* made an available railroad over the land taken, the obligation to the landowner had in that respect been fulfilled. On the general question as to whether there was an obligation to make a line of railroad for which an act was obtained, a peremptory mandamus was granted in the Queen's Bench by a divided court, notwithstanding the powers of the company had expired after the return to the alternative writ. Reg. v. Gt. Western R.R. Co., 16 Eng. L. & Eq. 341. The decision was, however, reversed in the Exchequer Chamber on writ of error. 1 El. & Bl. 874. In State v. Hartford, etc., R.R. Co., 29 Conn. 538, a railroad company was compelled by mandamus to run its trains and carry passengers to a station which it had discontinued.

not be compelled merely because it was physically possible, as such an application of the rule, by causing the company great expense and a serious derangement of its general business, would be harsh and unreasonable.¹

An act incorporating a ferry company provided that the rates of toll should be fixed by the mayor and aldermen of a city, provided, however, that such rates should never be so much diminished as to reduce the yearly dividend of the company to less than eight per cent. of the capital stock actually invested. It was held that if the rates of ferriage so established were not sufficient to produce the eight per cent. dividend, a mandamus would be granted in behalf of the company compelling the mayor and aldermen to revise the rates.²

§ 401. Not in general proper for refusal to transfer shares.— When the officers of a corporation refuse to transfer shares of stock in it on the books, and it is not claimed that those

¹ Chicago, etc., R.R. Co. v. People, 56 Ill. 365. Relator, a colored person, being owner by purchase from one Boileau of a lot in a cemetery, a permit for the burial of the relator's husband was refused, on the ground that the burial of colored persons in the cemetery would depreciate the value of the other lots. A mandamus was granted to compel the cemetery company to allow the burial. The court said: "Boileau has some rights in the premises which are not forfeitable to the pecuniary interests of the stockholders. When he purchased the lot in question there was no restriction on his right of sepulture, and the managers of the company had no power afterward to abridge such right by any unreasonable limitation thereon." Mt. Moriah Cemetery Co. v. Com., 81 Pa. St. 235. A mandamus will lie to compel the admission of a negro child to a public school from which he has been

unlawfully excluded. Kaine v. Com., 101 Pa. St. 490.

² East Boston Ferry Co. v. Boston, 101 Mass. 488. When a statute requires a joint stock corporation to furnish to the appeal tax court a list of its stockholders with their places of business and the amount of stock held by each, and neglects or refuses to do so, a mandamus will be issued to compel compliance. Insurance Co. v. Baltimore, 23 Md. 296. An act of the legislature made it the duty of the presidents of the banks of the State, at stated periods, to set apart out of the dividends the amount of tax levied on the stock of their several banks. The president of a bank refusing to comply with this requirement, a mandamus was granted. State v. Mayhew, 2 Gill, 487. The same process was issued to compel directors of the poor to act on a claim for services rendered by a physician. Campbell v. Grooms, 101 Pa. St. 481.

shares possess any peculiar value, that is to say, any value beyond that of the same number of other shares of the corporation, mandamus is not the proper remedy, for the reason that the relator can obtain title, by purchase, to other shares, and thereby acquire rights of membership equivalent to those which he seeks to vindicate by this process ; and if he has sustained damage, he can be indemnified by an action against the corporation.¹ But although, as a general rule, a mandamus will not lie to compel a corporation to transfer upon its books shares of its capital stock when sold, yet where the law requires a sheriff selling stock under an execution to transfer it to the purchaser, the statute by implication makes it the duty of the officers of the corporation to give the sheriff access to the transfer books for that purpose, and, upon their refusal, a mandamus will be granted to compel them to do so. In such case, the stock is described with sufficient certainty in the writ as "ten shares of the capital stock of said bank, then the property of," naming the person whose interest has been sold. An alternative writ, which alleges that respondents are officers of the corporation having charge of its transfer books, and that as such officers they refused to allow the sheriff access

¹ Rex v. Bank of England, 2 Doug. 524; Shipley v. Mechanics' Bank, 10 Johns. 484; Fireman's Ins. Co., *ex parte*, 6 Hill, 243; People v. Parker Vein Coal Co., 10 How. Pr. 543; State v. Warren Foundry, etc., Co., 32 N. J. 439; State v. People's Building Assoc., 43 Id. 389; Birmingham Fire Ins. Co. v. Com., 92 Pa. St. 72; Murray v. Stevens, 110 Mass. 95; Stackpole v. Seymour, 127 Id. 194; Freon v. Carriage Co., 42 Ohio St. 30; Townes v. Nichols, 73 Me. 515; State v. Rombauer, 46 Mo. 155; State v. St. Louis, etc., Co., 21 Mo. App. 526; Kimball v. Union Water Co., 44 Cal. 173; 13 Am. R. 157; Wilkinson v. Providence Bank, 3 R. I. 22; Baker v. Marshall, 15 Minn. 177; State v. Guerrero, 12 Nevada, 105. *Contra*, Cooper v. Dismal Swamp Canal Co., 2 Murphey S. C. 195; Townsend v. McIver, 2 S. C. 25; State v. Cheraw, etc., R.R. Co., 16 Id. 524; Green Mt., etc., T. Co. v. Bulla, 45 Ind. 1; People v. Goss Manf. Co., 99 Ill. 355; Campbell v. Morgan, 4 Bradwell, Ill. App. Rep. 105. See People v. Crockett, 9 Cal. 112; Bailey v. Strohecker, 38 Ga. 259; Reg. v. Liverpool, etc., R.R. Co., 11 Eng. L. & Eq. 408.

to the books for the purpose of making the transfer, will be good on demurrer.¹

§ 402. To compel the surrender of the corporate books.—A mandamus may be obtained against a person who has the books of a corporation in his possession, and refuses to give them up.² Where the petitioners, averring that they were selectmen of a town named, prayed for a mandamus commanding the respondents, who also claimed to be selectmen, to surrender the books and records pertaining to the office, it was held that mandamus was the proper remedy. The court said that it would inquire into the regularity and result of the election, and if it found that the petitioners were duly elected, a peremptory mandamus would be granted.³ The petitioner and the respondent both claimed the office of county treasurer, and the petitioner was in possession of the books of the office. The respondent, without the knowledge or consent of the petitioner, entered the office and took therefrom a book known as The Tax Duplicate. A peremptory mandamus was issued compelling the respondent to restore the book to the custody of the petitioner. The mode of obtaining the book being a wrong, the possession of it by the respondent could not be regarded as affording evidence of his possession of the office.⁴

§ 403. Compelling the inspection of corporate books.—Unless the charter provides otherwise, a shareholder in a trading corporation has a right to inspect its books and papers, and to take minutes therefrom for a definite and proper purpose at reasonable times. The doctrine of the law is, that the books and papers of the corporation, though of necessity in

¹ State v. First Nat. Bank, 89 Ind. 302; Bailey v. Strohecker, 38 Ga. 259. See Durham v. Manf., etc., Co., 9 Oregon, 41.

² St. Luke's Church in Chelsea v. Slack, 7 Cush. 226.

³ Kimball v. Lamprey, 19 N. H. 215.

15 Ill. 492.

⁴ Runion v. Latimer, 6 S. C. 126.

the keeping of some one, are the common property of all of the stockholders, and if an inspection of them is refused, the shareholder is entitled to an extraordinary remedial writ for the enforcement of his right. The interests of all of the corporators require that the writ shall not be issued at the caprice of the curious or suspicious. But it would seem, from the weight of authority and in reason, that a shareholder is entitled to a mandamus to compel the custodian of corporate documents to allow him an inspection and copies of them at reasonable times, and for a specific and proper purpose. A relator was a shareholder in a corporation which had apparently been doing a very large and profitable business, but which had not declared a dividend for several years, nor would it, upon the demand of the relator, show an itemized account of the business. The relator alleged that he proposed to file a bill in equity against the corporation, and that it was necessary for him to see the books and papers in order that he might correctly aver the facts. It was held that he was entitled to a mandamus, but that the writ should not extend to any books and papers other than such as contained information upon the subjects specified in the prayer of the petition.¹ An application

¹ People v. Lake Shore, etc., R.R. Co., 11 Hun, 1; Matter of Sage, 70 N. Y. 221; Cockburn v. Union Bank, 13 La. Ann. 289. See Rex v. Newcastle, 2 Strange, 1223; Regina v. Wilts, etc., Canal Navigation Co., 29 L. T. N.S. 922; Rosenfield v. Einstein, 46 N. J. 479. In a recent case in Pennsylvania, the court said: "It has never been asserted that a partner in a large company, under the pretence of inconvenience, can at all times be lawfully denied inspection of its accounts, unless the denial rests upon his own agreement. For proper purposes, and at reasonable times, the law gives him the right, even if its exercise be inconvenient to the bookkeepers and managers of the partner-

ship business. . . . The necessary limitations practically prevent exercise of the right for speculative purposes, or the gratification of curiosity. If every shareholder could inspect for such purposes at his own will, the business of most corporations would be greatly impeded." Com. v. Phoenix Iron Co., 105 Pa. St. 111, per TRUNKEY, J. In Rex v. Merchant Taylor Co., 2 Barn. & Ad. 115, TAUNTON, J., said: "There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute between members, or between the corporation and individuals

was made on behalf of the secretary of state to compel an insurance company to submit its books and affairs to such an examination as was contemplated by the statute, the general purpose of which was to regulate the business of insurance throughout the State. The act empowered the proper public officer to demand an examination at any time without a previous notice, and without affording the officers of the corporation an opportunity to prepare deceptive appearances. As in this case, no prosecutions either of the company or its officers could speedily and beneficially afford policy-holders the desired protection, the writ was awarded, under the rule that this will be done whenever a statute imposes a specific duty, either in express terms or by fair and reasonable implication, and there is no other adequate remedy.¹

Where a statute provides that the book or books of any incorporated company in the State in which the transfer of its stock is registered and those which contain the names of its stockholders shall be open to their examination, a company cannot, by a wilful neglect to keep such a book, deprive a stockholder of his right of inspection on the plea that the book contains other information which the company is not required to give. If the corporation does not keep the books which the statute prescribes, it is its duty to permit an inspection of such as it does keep for the purpose of recording its transactions, and if the inspection of that book is on demand refused, the stockholder is entitled to a mandamus.² The directors of a bank are all equally entitled to the inspection of the corporate books, and a

in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary." This concisely states the circumstances in which the shareholder may have the specific remedy if refused permission to inspect corporation docu-

ments and books. See *Martin v. Bienville Oil Works*, 28 La. Ann. 204.

¹ *People v. State Ins. Co.*, 19 Mich. 392.

² *People v. Pacific M. S. Co.*, 50 Barb. 280.

mandamus will be granted on the petition of one of them when such inspection is refused.¹ Judgment having been obtained against a railroad company, and no property of the company having been found on which to levy an execution, a mandamus was issued on the petition of the judgment creditor commanding the company to produce the register of stockholders and to allow the petitioner to inspect it, in order to ascertain the names of the stockholders and the amount of capital unpaid on their respective shares.² On an application to compel a foreign corporation to exhibit to the relator the transfer books of the corporate stock, it was held that although the legislature could constitutionally authorize the courts of the State to exercise such an authority over all corporations which brought themselves and their property within the jurisdiction, yet, as there was no statute on the subject in the State, the mandamus must be denied.³

§ 404. Restoration of member unlawfully removed.—Mandamus is the proper remedy to restore to his corporate rights a member of a corporation who has been wrongfully excluded therefrom.⁴ The petition for the writ must show that the corporator has been and is denied the right to exercise or enjoy the corporate franchises, and not merely

¹ People v. Throop, 12 Wend. 183.

² Reg. v. Derbyshire, etc., R.R. Co., 26 Eng. L. & Eq. 101.

³ People v. Northern Pacific R.R. Co., 50 N. Y. Supr. Ct. 456.

⁴ Delacy v. Neuse River Co., 1 Hawks, 274; Com. v. Pa. Ben. Inst., 2 Serg. & Rawle, 141; Com. v. St. Patrick's Ben. Soc., 2 Binney, 441; People v. St. Franciscus Ben. Soc., 24 How. Pr. 216; People v. Ben. Soc., 3 Hun, 361; Sleeper v. Franklin Inst., 7 R. I. 523; Roehler v. Mechanics' Aid Soc., 22 Mich. 86. The courts have no jurisdiction over a voluntary

society if it violates no law of the State, its members having no property in their membership which the law can protect. But when a voluntary society accepts a charter, it becomes a private, civil corporation, the corporators then in being acquire a property in the franchise, and every person who subsequently becomes a corporator acquires a like property. If the rights of one of these members or corporators are infringed, or he is deprived of them by the illegal action of the society, he is entitled to a mandamus if he has no other remedy. State v. Georgia Medical Soc., 38 Ga. 608.

that he has been improperly restricted in the mode of exercising his rights.¹ Where the relator was suspended by the board of directors from all of the privileges of membership in the Chamber of Commerce of Milwaukee without a vote because he would not withdraw a suit against a fellow-member and submit his claim to the arbitration of a committee, it was held that he was clearly entitled to a mandamus.² A by-law of an incorporated benevolent society provided that no soldier of a standing army should be capable of admission, and that any member who should voluntarily enlist as a soldier should thenceforth lose his membership. The relator voluntarily enrolled himself as a private soldier, and was mustered into the service of the United States for a term of twelve months. It was held that as the condition held out to the corporators inducements not to serve in the army, it was not to be favored in construction, and as this was not an enlisting by the relator into the standing army, a peremptory mandamus would be granted restoring him to membership.³ A party was a member of a subordinate lodge of which the respondent, a Michigan corporation, was the supreme governing authority in the State. As such member he was insured by the respondent in the sum of two thousand dollars. For refusing to recognize and pay an assessment made under the orders of the supreme lodge of the order, which was a corporation existing under the laws of another State, and not subject to the jurisdiction of the courts of Michigan, the relator was suspended by the respondent, thereby losing his insurance. The assessment was made to pay losses on risks taken in other States and by other grand lodges. A man-

¹ Crocker v. Old South Soc., 106 Mass. 489. See Kopp v. French, 102 N. Y. 583.

² State v. Chamber of Commerce, 20 Wis. 63.

³ Franklin Ben. Assoc. v. Com., 10

Barr. 357. No point was made in this case of the fact that the relator was dropped in accordance with a by-law without any apparent authority in the articles of incorporation.

damus was granted to reinstate the relator and compel his recognition as a member of the subordinate lodge. The court said : " It is not competent for the respondent to subject itself or its members to a foreign authority in this way. No point was made in the argument as to the propriety of affording to the relator this particular remedy, and as the case is one in which the general law of the State under which respondent is organized is being ignored and perverted, we are not disposed to go beyond an examination of the equities. This is a discretionary writ, and in general we shall decline to interfere by means of it in the controversies of private corporations, when the facts are not such as to be important on public grounds, or such as would justify our interference if corporate powers did not exist. The better way is for parties wronged by the action of such bodies to seek the proper remedy in common law suits."¹

Where the charter of a society directs the mode of proceeding in case of an offence, and authorizes the society on conviction of the member to expel him, if this has been done after a hearing and trial according to the mode prescribed, and there is no allegation of irregularity in the proceedings, the sentence is conclusive on the merits and cannot be inquired into collaterally either by mandamus or action.² Upon an application for a mandamus to compel a society to restore to membership the applicant who had been expelled, it appeared that the proceedings were conducted with deliberation, that several opportunities were given to the member to be heard, and that the vote for expulsion was unanimous. There being no evidence of haste or prejudice, or that the society made a wrong decision, or acted in violation of the petitioner's rights, the petition was dismissed.³

¹ Lamphere v. Grand Lodge, etc., 47 Mich. 429.

² Barrows v. Mass. Med. Soc., 12 Cushing, 402.

³ Com. v. Pike Ben. Soc., 8 Watts & Serg. 247.

§ 405. **Compelling admission or restoration to office.**—Mandamus is the proper remedy to compel the admission of a person to an office or position to which he is entitled, when it is not filled by another claiming under color of right.¹ A county medical society having refused to admit to membership a practicing physician who was legally qualified, a peremptory mandamus was granted to compel the society to admit him.² While a mandamus will not be granted when the title to an office is disputed by another person in and claiming the rightful possession of it, yet where the term of the incumbent will expire upon the qualification of his successor, it does not require a *quo warranto* or an information of that nature to ascertain by what authority the former is in office and claims to exercise its functions, and a mandamus is appropriate when the party entitled is kept out, if he has no other redress.³ When an inquiry upon an information in the nature of *quo warranto* has been had, judgment of ouster been obtained, and the legality of the relator's election to the office established, a writ of mandamus will be issued compelling the admission of the relator to his rights if it is refused.⁴ Where the language of the statute was that an appointee should be commissioned by the governor, it was held that a mandamus would be granted compelling the governor to issue the commission in case he refused to do so.⁵

When a person in possession of an office under color of right is interfered with by another claiming the same office, the remedy is by mandamus. In such a case the incum-

¹ *Curtis v. McCullough*, 3 Nevada, 202. If the relator be the agent in the State where the suit is brought of a foreign corporation, and the defendant is depriving him of the right to act for his principal, the court has power to determine which of two persons is entitled to the position claimed, the proceeding being simply between individ-

uals over whom the court has jurisdiction, and the source whence they derive their rights being immaterial. *Ibid.*

² *People v. Medical Soc.*, 32 N.Y. 187.

³ *Harwood v. Marshall*, 9 Md. 83.

⁴ *St. Louis County v. Sparks*, 10 Mo. 117.

⁵ *Bonner v. State*, 7 Ga. 473.

bent should not be required to elect to consider himself out of possession of the office, and then to resort to a tedious proceeding to procure his restoration. But where an office is already filled by a person who has been admitted and sworn, a mandamus is not issued to admit another person. The remedy for the applicant is by *quo warranto*, or an action substituted therefor.¹ It was held in Texas that a mandamus was proper to restore to office the clerk of a court who had been ousted from it by the illegal appointment of another person.² Where the relator had been a member of a board of trustees of an academy, and had been removed by his co-trustees, it was held that a mandamus would be granted to restore him to his position as trustee, if it was found upon examining the return to the writ that he had been illegally removed.³ An act incorporating a college provided that its board of trustees should be composed of twenty-five persons who were authorized to appoint professors, subject to removal by a vote of two-thirds of the members of the board, when found expedient and necessary. The relator was duly appointed a professor in the college, which position he held several years. At a meeting of the board of trustees, twenty-one of the members of it being present, the professorship which the relator held was abolished by a vote of seventeen to four. The only notice of the meeting was by a postal-card addressed to each of the trustees. The statute directed that notice of the time and place of every such meeting should be given in a newspaper printed in the county where the college was situated, and that every trustee resident in the county should be previously notified in writing of the time and place of meeting. The court, in granting a mandamus, said that the abolition of the professorial chair in effect constituted a

¹ People v. Scrugham, 20 Barb. 302.

question to be determined by the court.

² Banton v. Wilson, 4 Texas, 400.

State v. Common Council, 9 Wis. 254.

When the power to remove for "due cause" is given, what is due cause is a

³ Fullerv. Plainfield Academic School, 6 Conn. 532.

removal of the relator from office, and that as notice of the meeting was not given in accordance with the statute, no legal meeting was held.¹

§ 406. Reinstating teacher.—Under the school law of Connecticut a school district is created a public territorial corporation, and the duty is imposed on it of establishing and maintaining schools within its limits. The district elects annually a committee, and if the district neglects to provide a teacher and rooms, the committee is authorized to do so. If the committee refuses to reinstate a teacher whom it has removed, a mandamus on the petition of the district is the only legal and specific remedy.²

§ 407. Enforcing right of admission to school.—Every person qualified under the law to attend the public schools is entitled to an order of admission, and if such order is refused upon due demand, a mandamus will be issued compelling the trustees to grant the order. While the right to such admission is subject to regulation, whether the conditions adopted by the trustees are reasonable and in conformity with the law, and whether a statute prescribing certain qualifications is in conformity with the constitution of the State, will be decided by the court in the particular case before it. While the trustees may not deny to any resident person of proper age an equal participation in the benefits of the schools, the better opinion seems to be that it is within their power to make such a classification as to age, sex, race, or any other existent condition, as may seem to them judicious.³ A person applied for a mandamus to compel the trustees of schools of a town to admit his son as a pupil in the high-school. Respondents denied the son

¹ People v. Albany Med. College, 62 How. Pr. 220.

² Gilman v. Bassett, 33 Conn. 298. The fact that the district has decided by a vote that the school shall soon be

discontinued, may be a reason why the district ought not to insist upon a mandamus, but not that it is not entitled to it. Ib.

³ State v. Duffy, 7 Nevada, 342.

admission solely because of his inability to pass a satisfactory examination in grammar, which the relator had forbidden his son to study. The powers of the trustees so far as they affected the question before the court were "to adopt and enforce all necessary rules and regulations for the management and government of the schools ; to direct what branches should be taught, and what text-books and apparatus should be used ; and to enforce uniformity of text-books." It was held that no particular branch of study was compulsory upon those who attended the school, but that schools were simply provided by the public in which prescribed branches were taught free to all within the district between certain ages ; and that the exclusion of the relator's son from the high-school upon the ground alleged was unauthorized, arbitrary, and unreasonable. The mandamus was accordingly awarded.¹ The school law of Michigan provided that all residents of any district should have equal right to attend any school therein ; but that this should not prevent the grading of schools according to the intellectual progress of the pupils to be taught in separate places, when deemed expedient. The city of Detroit being a school district, its board of education established separate schools of the same grade for white and colored scholars, and made a by-law prohibiting the admission of colored children into the white schools of the city. Relator, a colored citizen and tax-payer, applied for the admission of his child into one of the white schools, which being refused, a mandamus was issued compelling it.²

If the rules and regulations adopted by a board of education with regard to the admission of children, and their distribution in the different schools under its care, are within its power, the court cannot interfere by mandamus, whether the board exercises the power wisely or not.

¹ Trustees v. People, 87 Ill. 303. Mich. 400, CAMPBELL, J., dissent-

² People v. Board of Education, 18 ing.

Where a colored man claimed the right to send his children to a school appropriated for white children, instead of sending them to a school which the board of education had provided for colored children, the court in refusing a mandamus, said : " Equality of rights does not make the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school. There is, then, no ground on which the plaintiff can claim that his rights under the fourteenth amendment have been infringed."¹

§ 408. To compel the raising of money by taxation.—When a municipal corporation, being authorized by law, issues its bonds, with power of local taxation for the purpose of meeting the payment of the bonds and interest, a mandamus will lie compelling the imposition and collection of taxes sufficient to make such payment if the corporation fails in its duty in this respect.² The charter of a city provided that the city council might, if it believed that the public good and best interests of the city required, annually collect a tax not exceeding one per cent. on a dollar to be paid on the funded debt of the city. With this provision in force, the city issued a large amount of bonds. Subsequently, the legislature passed an act specifying the rate and amount of taxes which should be imposed and collected in the city, which amount was not sufficient, after defraying current expenses, to pay the interest on the bonded debt. It was held that a mandamus should be granted compelling the corporation to levy and collect annually an additional tax, as stipulated in the charter, to be applied on the bonds.³ The legislature of Wisconsin empowered the city of Mil-

¹ People v. Easton, 13 Abb. Pr. N. S. 159. the writ neither the original party in whose favor the bonds were issued,

² Von Hoffman v. Quincey, 4 Wall. 535; Com. v. Pittsburg, 34 Pa. St. 496; Com. v. Commissioners of Allegheny Co., 37 Id. 277. In the application for

nor the tax-payers, need be made parties. Maddox v. Graham, 2 Metc. Ky. 56.

³ Galena v. Amy, 5 Wall. 705.

waukee to issue bonds to raise money for the construction of a harbor, which, having been completed by the plaintiff, he brought an action and obtained a judgment against the city for a balance due him, and for which the city refused to issue to him its bonds. It was held that as by the charter in force when the contract was entered into, all property, real and personal, within the city, except such as was exempt by the laws of the State, was subject to taxation for the support of the city government and the payment of its debts and liabilities, a mandamus might be maintained to compel the city to pay the judgment, if the money to pay the same could be provided in no other way, and the creditor had no other remedy.¹ The established rule in the Supreme Court of Iowa is, that where the debt of a municipal corporation has been reduced to judgment, and the judgment creditor has no other means to enforce the payment, a mandamus will be issued to compel the proper officers of the municipality to levy and collect a tax for that purpose.²

When a jury is appointed to assess the damages in the laying out of a village street, and has found a verdict which has been reduced to writing, a mandamus will be granted at the relation of the trustees of the village to compel the delivery of the verdict to them. In such a case, the court said that if the jury had parted with the control of the verdict, it was its business to recover possession of it and com-

¹ State v. Milwaukee, 25 Wis. 122, Paine, J., dissenting. When a municipal corporation has the power to contract a debt, it has by necessary implication authority to resort to the usual mode of raising money to pay it, which is taxation. "If the municipal authorities failed or refused to execute and deliver the bonds payable at a future day as by law they were authorized and by the contract bound to do, such failure or refusal was an election to

consider the money due presently or whenever the creditor should obtain judgment for the same. If, therefore, the application had been for a mandamus to compel the execution and delivery of the bonds, the objection to it that the relator had an adequate remedy by an action at law to recover damages for the breach, would have been valid, and must have prevailed." Ibid., per DIXON, J.

² Riggs v. Johnson County, 6 Wall. 166.

plete its duty.¹ A county court which was authorized to levy taxes in the county, subscribed for stock in a turnpike company. It was held that a mandamus was the proper remedy to compel the court to levy and collect a tax with which to pay for the stock, if the court refused to do so.² When a banking association by a resolution of its board of directors reduces its capital by a distribution of a portion of it among its stockholders, and a statute provides that in such a case the assessment for taxes shall be reduced an equal amount, if the assessors refuse to make the reduction upon an application from the association for that purpose, a mandamus will be granted compelling them.³

§ 409. Authority of court to issue.—Power to issue writs of mandamus to any courts appointed under the authority of the United States, was given to the Supreme Court by the thirteenth section of the judiciary act in cases warranted by the principles and usages of law. This section also empowered the court to issue writs, subject to the same conditions, to persons holding office under the United States. But the Supreme Court decided that the latter provision was unconstitutional and void, as it assumed to enlarge the original jurisdiction of the court as defined by the constitution.⁴ A writ of error may be issued from the United States Supreme Court to the circuit court for the District of Columbia, on a judgment awarding a peremptory mandamus to restore to office, when the matter in controversy is sufficient to give the court jurisdiction.⁵ United States circuit courts in the several States cannot issue writs of mandamus as an attribute of original jurisdiction, but only when it is necessary to the exercise of their proper powers,

¹ *In re Trustees of Williamsburg*, 1 Barb. 34.

² *Justices of Clark County Court v. Paris, etc., Turnp. Co.*, 11 B. Mon. 143.

³ *People v. Olmsted*, 45 Barb. 644.

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⁴ *Newman, ex parte*, 14 Wall. 152. See *Marbury v. Madison*, 1 Cranch, 175; *Hoyt, ex parte*, 13 Pet. 290.

⁵ *Columbian Ins. Co. v. Wheelwright*,

7 Wheat. 534.

and their judgments in such cases may be re-examined in the United States Supreme Court on writ of error under the twenty-second section of the judiciary act.¹ While the State courts are exempt from all interference by the Federal tribunals, they are at the same time destitute of power to restrain either the process or proceedings of the national courts. Hence, when a United States circuit court has complete jurisdiction of a case which results in a judgment, if a writ of mandamus is a remedy ancillary to the judgment, and it is the proper process to enforce the payment of it, a State court cannot enjoin such process of the Federal court. *Riggs v. Johnson County*² was an application to the circuit court of the United States for the district of Iowa, for a mandamus to compel the supervisors of a county to assess a tax upon the taxable property of the county to satisfy a judgment on bonds issued by the county for stock in a railroad company, a return of *nulla bona* having shown that the creditor was without other remedy. It was held that the petitioner was entitled to the writ, notwithstanding an injunction had been granted by the Supreme Court of Iowa perpetually restraining the county commissioners from levying any tax to pay similar bonds. The bonds in question were given while the State decisions that the county could issue such bonds were yet unreversed.³

When a court of limited jurisdiction has not had power to award the writ given to it by statute, and it is not necessary to carry into full effect the jurisdiction granted, it cannot be implied.⁴ The Supreme Court of Pennsylvania will not issue a mandamus, even though it has no doubt of its authority to do so, in a case which is but an ordinary one relating to the duty of a local or city officer over which the court of common pleas has all needed authority.⁵ The

¹ *Riggs v. Johnson County*, 6 Wall. 166; *McIntire v. Wood*, 7 Cranch,

504.

² 6 Wall. 166.

³ *CHASE, C. J., MILLER and GRIER*, JJ., dissenting.

⁴ *School Inspectors v. People*, 20 Ill.

525.

⁵ *Com. v. Baroux*, 36 Pa. St. 262.

practice in that State has been not to issue such a writ except from the court which sits in the district in which the persons to whom the mandamus is directed reside.¹ In Illinois, an action having been brought in the circuit court of G. County against the county, the venue was afterward changed to the circuit court of S. County, where judgment was rendered for the plaintiff. The county court of G. County refused to act on the judgment, and a mandamus was obtained from the circuit court of S. County. The statute provided that a suit against a county must be brought in the circuit court of the county sued. It was held that the application for the mandamus should have been made to the circuit court of G. County.² Under the clause in the constitution of Florida providing that the Supreme Court of the State should have appellate jurisdiction only, but that the court should always have power to issue writs of injunction, mandamus, and such other remedial and original writs as might be necessary to give it a general superintendence and control of all other courts, it was held that a petition to show cause why a mandamus should not be granted, must be denied in a case where the petition did not ask for the exercise of the superintending and controlling power of the Supreme Court upon the action of another court.³

§ 410. Who may apply for a mandamus.—In this country the authorities favor the doctrine that private persons may move for the writ to enforce a public duty not due to the government as such, without the intervention of the law officer of the State.⁴ Therefore, on a petition for a mandamus to compel a city to take charge of a bridge and preserve it as a free public highway, in accordance with an act of the legislature which provided that it should be done, it

¹ Com. v. Clark, 9 Serg. & Rawle, 59.

⁴ Union Pacific R.R. Co. v. Hall, 91

² McBane v. People, 50 Ill. 503.

U.S. 343; State v. Bailey, 7 Iowa, 390;

³ White, *ex parte*, 4 Fla. 165.

City of Ottawa v. People, 48 Ill. 233.

was held not incumbent on the petitioner to show any personal interest in the matter different from that of other citizens.¹ But a different rule prevails in some of the States. Thus it was held in Maine that a private individual could only apply for a mandamus when he had some private or particular interest to be subserved, or some particular right to be protected independently of that which he had in common with the public at large. Hence, that where county commissioners omitted to lay out a public highway which the statute provided they should proceed to do, a mandamus would not be granted on the petition of a private person whose petition did not allege any interest of the petitioner to be promoted, or that his rights were in any degree diminished by the omission complained of, more than those of any other person in the community, notwithstanding the commissioners might have been liable to a peremptory mandamus if the application had been made by a public officer.² In Pennsylvania, an act of the legislature enjoined and required the town council of a borough to open a certain alley in the borough. The petitioner alleged that he was the owner of a lot through which the alley must pass, and that the opening of the alley would greatly enhance the value of his lot ; and that he had notified the town council of the statute, and requested it to open the alley, which it had refused to do. A mandamus having been granted in the court below, the decision was reversed on appeal. The alley was to be a public highway, and every citizen of the State would have an equal right to the free use and enjoyment of it. The relator had no interest that was specific and at the same time a legal cause of action. He had no more right to call upon the municipal authorities to open an alley, to put money in his pocket, than he would have to require them to build him a house. His claim rested on the

¹ Pumphrey v. Baltimore, 47 Md. ² Sanger v. County Commissioners, 145. 25 Me. 291.

right of passage,—the right to enjoy the alley as an alley,—and this right was not peculiar to him, but common to the whole town, and, therefore, a subject of public concern.¹

Where a railroad company has failed to construct a public highway along the side of its track, as required by its charter, the supervisors of the township in which such highway will lie, are proper persons to apply for a mandamus compelling the company to comply with its charter in this respect.² Under a statute directing a city council to provide for and pay the interest on bonds issued for the erection of a bridge, and also to provide for and appropriate such sum or sums as may be necessary to defray the expenses of the board of commissioners, the latter may have a mandamus to compel the payment of its expenses, but the bondholders are the proper persons to apply for the writ to compel provision for the payment of interest on the bonds.³ Upon a petition from the town agent, praying for a writ of *quo warranto*, or mandamus, or other appropriate process, where a person not duly elected was in possession of the books and other fixtures of the town clerk's office, a peremptory mandamus was granted, though the writ might with propriety have been applied for by the duly elected town clerk himself.⁴

§ 411. The petition.—The grounds upon which the writ is claimed should be positively and distinctly stated in the petition, and anticipated objections be answered. This certainty of pleading on the part of the relator is essential, for the reason that a mandamus is not allowed when the

¹ Heffner v. Com., 28 Pa. St. 108. See Reading v. Com., 11 Id. 196; People v. Collins, 19 Wend. 56. When a board of county commissioners has no power, supervision, or care over, or any responsibility for, the bridges of turnpike companies, it has no such beneficial interest in the performance of the corporate duty of keeping such

bridges in repair, as entitles it to prosecute a writ of mandamus. State v. Zanesville, etc., Turnp. Co., 16 Ohio St. 308.

² Whitemarsh v. Philadelphia, etc., R.R. Co., 8 Watts & Serg. 365.

³ Commissioners v. Philadelphia, 3 Brewst. Pa. 596.

⁴ Walter v. Belding, 24 Vt. 658.

law affords another adequate means of redress, and also because the writ issues only to compel the performance of some duty clearly defined by law.¹ Facts, and not legal deductions and conclusions, must be alleged, and the petitioner must show a clear legal right in himself, and a corresponding obligation on the part of the respondent.² Separate claims cannot be united in one application;³ nor one and the same writ be directed to two or more persons whose duties and liabilities are distinct.⁴

In the absence of a statutory provision to that effect, a mandamus will not be granted a corporator, compelling the custodian of corporate records and documents to allow him an inspection of them, unless he shows that he has made a demand at a suitable time and place, and for a proper reason, and has been refused. To aver that he desires such an inspection, in order to learn the condition of the corporation, as well as to ascertain and determine his rights, duties, privileges, and liabilities, and for his protection as a stockholder, is not sufficient.⁵ An express demand and refusal are not essential in the case of a public duty, where no individual right or interest is concerned, and there is no one person who is called upon to make a demand. The law does not require a useless thing. If it points out what is to be done with the time and place, this is equivalent to a demand.⁶ So, if it be clear from the acts of the defendant, as proved, that he does not intend to comply with the demand, it will be considered by the court as tantamount to a refusal.⁷ Notice that a transfer of shares of stock will not be made, removes all obligation on

¹ Cullem v. Latimer, 4 Texas, 329. See People v. Cady, 99 N. Y. 620.

⁴ State v. Chester, 5 Halst. N. J. 292.

² Arberry v. Beavers, 6 Texas, 457; Houston, etc., R.R. Co. v. Randolph, 24 Id. 317.

⁵ People v. Walker, 9 Mich. 328. ⁶ State v. Bailey, 7 Iowa, 390.

³ Heckart v. Roberts, 9 Md. 41.

⁷ Maddox v. Graham, 2 Metc. Ky. 56; Com. v. Pittsburg, 34 Pa. St. 496.

the part of the relator to appear in person at the office of the corporation to demand the transfer.¹

The petition ought to be verified by affidavit, as otherwise the time of the court might be taken up with frivolous applications, or merely for the purpose of obtaining the opinion of the court on a supposed statement of facts.²

§ 412. Rule to show cause.—Unless the person or body against whom the mandamus is prayed, has had notice, and been represented before the court, the usual course in applying for the writ, is to obtain a rule on the defendant to show cause why a mandamus should not issue, and, if the cause shown be deemed insufficient, then a mandamus in the alternative issues, to which a return is to be made.³ This gives the party to whom the writ is directed an opportunity to do the act, or to show good reason, at the return of the writ, why he ought not to do it. He does this by making a return to the writ. It is at this point the pleadings in the cause begin. The return may traverse the facts alleged in the writ, or, admitting them, may avoid performance by stating sufficient facts in excuse. The relator may then demur, plead to, or traverse the facts set forth in the return.⁴ In some cases, a mandamus will be granted on motion, of which the defendant has had due notice, without a rule to show cause. Thus, where, on a motion for a mandamus to justices of the peace, to allow a poor rate, it appeared that the rate was regularly made, and that the defendants had refused to allow it, the rule was made absolute in the first instance, the court observing that it was not proper to make a rule to show cause in this case, because, while the rule was depending, the poor might

¹ Townsend v. McIver, 2 S. C. N. S. 25. ex parte, 7 Id. 526; Com. Bank of Albany v. Canal Commrs., 10 Wend. 25;

² Black v. Auditor, 26 Ark. 237.

Board of Police v. Grant, 9 Smedes &

³ Rex v. Bankes, 1 W. Blk. 445;

Marsh, 77.

People v. Everitt, 1 Caines, 8; Boston,
wick, *ex parte*, 1 Cowen, 143; Rogers,

⁴ Keasy v. Bricker, 60 Pa. St. 9;
Phoenix Iron Co. v. Com., 113 Id. 563.

suffer, no overseer being obliged to disburse money until he had a rate for collecting it.¹ And the same thing was done on a motion for a mandamus for proceeding to the election of a mayor of a borough, it appearing that there had been no election on the day appointed by the charter, nor on the day after, and that the office of mayor was vacant.² It has been said that there is a distinction between the case of a mandamus to swear or to admit, and a mandamus to restore; that in the first case, if the right of the party appear plain the court will probably grant the writ on the first motion, but that in the latter, it will first grant a rule to show cause.³ The rule must be made on the same persons to whom the mandamus is to be directed; though if improper in this respect, the court may on motion give leave to amend it, in which case there must be a new service.⁴ Upon the hearing on a rule to show cause, the relator has the affirmative.⁵

§ 413. Nature and requisites of the writ.—No precise form is required.⁶ An alternative mandamus becomes the foundation of all of the subsequent proceedings. It answers the same purpose as a declaration in ordinary actions. It ought to show on its face a clear right to the relief demanded by the relator, and distinctly set forth all the material facts on which he relies, so that it may be admitted or traversed. The defendant is called upon to do the particular thing sought to be enforced, or by a return to deny the facts alleged in the writ, or to state other matters sufficient to defeat the relator's application. He need not answer the petition on which the writ is ordered; but a writ which simply commanded the defendant to perform an act specified, or furnish an excuse for not doing so, would be de-

¹ *Rex v. Justices of Berkshire, Sayer, 160.*

⁴ *Rex v. Church Wardens, cited 2 Kyd on Corp. 344.*

² *Rex v. Aldermen of Heydon, Sayer, 208, 209.*

⁵ *People v. Throop, 12 Wend. 183, note.*

³ *Buller, Ni. Pri. 129.*

⁶ *Rex v. Nottingham, Sayer, 37.*

fective.¹ In England, the mandamus states the allegations upon which the petition is granted, as well as what the defendant is commanded to do. In North Carolina, the practice is only to set out in the writ the latter, and to send with the writ a copy of the petition, so as to inform the party to what he is to make return.² In New York, so far as regards inferior judicial tribunals, the operation of the writ has been confined to a mandate that they proceed; but as to corporations and ministerial officers, the authority of the writ is recognized to be not only to compel them to act, but to direct the mode and manner of their action.³

Where a statute provides that one of two things shall be done, without specifying which, the party has the election to do which he pleases. Therefore in such case a mandamus which directs specifically that one of the acts shall be done, is invalid, unless it shows on the face of it a sufficient reason why the party is no longer to have the option, but is compellable by law to do the act therein commanded.⁴ If the writ is defective either in form or substance, the defendant may move to quash it; and any defect in the substance of the writ, such as a want of sufficient title in the relator to the relief sought, may be taken advantage of at any time before a peremptory mandamus is awarded. The mandamus must show not only what the defendant is required to do, but why he ought to do it, otherwise judgment will be given for the defendant on demurrer, even though the return itself be defective in substance, the rule being that judgment is given against the party who has committed the first fault.⁵ When the writ avers authority conferred by statute upon a city to subscribe to the capital stock of a corporation, to borrow

¹ Canal Trustees v. People, 12 Ill. 248.

⁴ Reg. v. Southeastern R.R. Co., 25

² McCoy v. Justices of Harnett Co., Eng. L. & Eq. 13.

⁴ Jones N. C. 180.

⁵ Com. Bank of Albany v. Canal

³ People v. Steele, 2 Barb. 397; 18 Commrs., 10 Wend. 25; People v. Random, 2 Comst. 490.
Wend. 79.

money to pay for the subscription, and to provide for the payment of the interest and principal of the sum so borrowed by assessing and collecting a tax, it is not necessary to aver or set out a law giving authority to provide for the payment of bonds or interest accruing on them, if the writ alleges that a subscription was made, and that the bonds in question were issued to pay the subscription; a power to borrow money, including the power to give bonds or other usual securities to the lender. If the date of the bonds is stated, that they bear interest which is in arrear, that the relator is the owner of some of the bonds, that the defendant has made no provision for payment, but has neglected and refused to do so, and these averments are true, the right to a peremptory mandamus is complete, although the writ does not allege when the principal is payable, what rate of interest the bonds bear, or the time or place at which the interest is payable. If the writ avers that the bonds were purchased by the relator, that they were duly transferred to him, and that he holds them in his own right, it is not necessary to set out the relator's title to the bonds, how they were transferred, or the consideration paid by him. An averment of the ownership of the bonds necessarily includes the ownership of the right to the interest secured by them.¹

. A trifling informality in the direction of the writ will not vitiate it if it be good in substance.² It must be addressed directly to the person who is to do the act, and not command him to compel another to do it.³ When the thing required is to be done by a corporate body it must be directed to it by its name. If the act is to be done by a part only of the corporation, it may notwithstanding be directed to the whole, and also to the part which is to do the act.⁴

¹ Com. v. Pittsburg, 34 Pa. St. 496.

² Pees v. Leeds, Strange 640.

³ Reg. v. Derby, 2 Salk. 436.

⁴ Rex v. Rippon, 2 Salk. 433; Rex

v. Tregony, 8 Modern, 112; Rex v.

Abingdon, 1 Ld. Raym. 560; Rex v,

When the obligation sought to be enforced devolves upon no particular set of individuals as officers, and no right is in question which will expire with the term of office, the duty is perpetual upon the incumbents and their successors, and the writ may be directed to and enforced upon them generally.¹ It is no objection to the writ that it is directed to two distinct and separate bodies, and commands distinct and separate acts, when some of the acts are to be done by one which do not pertain to the other, if they are a part of the principal object intended.² But a single mandamus cannot be directed to the officers of several corporations to compel them to perform distinct duties arising from distinct liabilities.³

A motion to quash an alternative writ is properly made before the return to it.⁴ A peremptory mandamus, if granted, must correspond with the alternative writ.⁵ But although a peremptory mandamus must not depart from the alternative writ, yet it will not be superseded on account of variance in unsubstantial matters of detail, or in the extent and mode of the work commanded for the accomplishment of the end. When an alternative writ has been issued commanding in general terms a thing to be done, if the return states that the order has been obeyed, and the court determines that it has not been, the peremptory mandamus should point out in what the failure consists, and direct particularly what must be done or omitted.⁶ Until the failure or refusal of an officer to perform his official duty,

Smith, 2 M. & S. 598. A change in the membership of a board does not so change the parties as to abate the proceedings. The constituent parts of the board may not be the same, but the representative body remains identical. Maddox v. Graham, 2 Metc. Ky. 56.

¹ People v. Collins, 19 Wend. 56, approved 13 Otto, 484.

² State v. Bailey, 7 Iowa, 390.

³ State v. Chester, 5 Halst. 592. It is not fatal to a mandamus to compel a corporation to transfer stock, that the seller and buyer of the stock are joined in the writ. Townsend v. McIver, 2 S. C. 25.

⁴ Harwood v. Marshall, 10 Md. 451.

⁵ People v. Supervisors of Westchester, 12 Barb. 446.

⁶ People v. Dutchess, etc., R.R. Co., 58 N. Y. 152.

this process cannot be employed against him. Therefore, when an alternative writ has been issued on the petition of the relator that the canvassers of election may be required to record their future proceedings, and to give the relator a certificate of his election founded on their future determination, a peremptory mandamus in that form will be denied.¹

In England, it was formerly the usual practice, if the party to whom the writ was directed did not make a return to it at the time it was made returnable, to issue an *alias* and a *pluries*, and after that a peremptory rule; though in urgent cases where mischief was to be apprehended from delay, the court required a return to the *alias*. The inconvenience arising from not requiring a return until after a *pluries* had been issued and returned, resulted in the statute 9 Anne, ch. 20, which provided that a return should be made to the first writ.² The mandamus may be amended at any time before the return; but not after the return has been made and traversed.³

§ 414. The return.—As already stated, when the petition

¹ State v. Gibbs, 13 Fla. 55.

² Kyd on Corp. 350, 351. The statute of Anne, after reciting that "persons who had a right to the offices of mayor, portreeve, bailiff, and other offices in cities, towns corporate, and boroughs, or to be burgesses or freemen there, had been either illegally turned out, or had been refused admission, and had in many cases no other remedy to procure themselves to be respectively admitted or restored to their offices or franchises than by writs of mandamus, the proceedings on which were very dilatory and expensive," enacted that, "after the first day of Trinity term, in the year 1711, where any writ of mandamus should issue out of the Queen's Bench, the courts of sessions of counties palatine, or out

of any of the courts of great sessions in Wales, in any of the cases aforesaid, such person or persons who by the laws of this realm are required to make a return to such writ of mandamus, should make his or their return to the first writ." After this statute the court began to adopt the rule here laid down in all cases. See Da Costa v. Russian Co., 1 Barnard, 24; 2 Strange, 783.

³ Rex v. Clitheroe, 6 Modern, 1333; Rex v. Stafford, 4 Term Rep. 690; Rex v. York, 5 Id. 74. When there is a material defect in the allegations of the writ, even an express admission in the return of a fact necessary to make the writ valid, does not supply the defect. Reg v. Southeastern R.R. Co., 25 Eng. L. & Eq. 13.

shows a *prima facie* case, the court awards an alternative mandamus commanding the defendant to do the thing required, or to show cause why it should not be done. To this writ the defendant must either comply with the prayer of the petition, demur, or make return. If the demurrer is sustained, that disposes of the application, and a peremptory mandamus is denied. But if the demurrer is overruled, the defendant must make return denying the allegations of the writ, or setting up new matter constituting a defense to the relator's claim. Where a demurrer to the petition having been overruled, the defendant asked leave to file an answer, which was refused by the court, and, upon motion of the relator, a peremptory mandamus was issued, it was held error.¹

As a mandamus to the justices of a county must be issued against them as a body, and not as separate individuals, they must make a return as a body. An answer by individual members would not constitute a return upon which the court issuing the writ could rightfully take action.² The return should be so drawn as to make it clearly appear to the court that the mandamus ought not to be granted. A mandamus is not to be answered by a frivolous, uncertain, or evasive return. It must have convenient certainty of time, place, and persons. It is not sufficient to set out conclusions only, but the facts themselves must be stated, so that the court may be able to judge of the matter. If the return is defective in this respect, a peremptory mandamus will be granted.³ An averment of want of good faith will be bad on demurrer; the facts to show the absence of good faith should be set out.⁴ The same was held of

¹ Swan v. Gray, 44 Miss. 393.

Gorgas v. Blackburn, 14 Ohio, 252;

² McCoy v. Justices of Harnett Co.,

Com. v. Pittsburg, 34 Pa. St. 496;

⁴ Jones N. C. 180.

People v. Kilduff, 15 Ill. 492.

³ Green v. African Meth. Epis. Soc.,
1 Serg. & Rawle, 254; Board of Police
v. Grant, 9 Smedes & Marsh, 77;

*Com. v. Commrs. of Allegheny Co.,
37 Pa. St. 277.

an answer that the election returns from two townships were rejected, "because they were not made in accordance with the law"; for the reason that, as it was necessary for the court to pass upon the question of the respondent's right to reject the returns, it was requisite that it should have before it for that purpose the causes of rejection and the specific nature of the alleged defects.¹

According to the strict rules of the common law, the some certainty is required in the return as in an indictment.² A county clerk made return to an alternative mandamus to compel him to extend the taxes on the collector's books according to an increased valuation pursuant to the statute that the act was unconstitutional. But he did not disclose the fact that the tax books had been already delivered by him to the township collectors. The court having decided that the statute was constitutional, and issued a peremptory mandamus, the defendant was brought into court on an attachment for contempt in not obeying the writ. It was held no defense that the defendant had delivered the books to the tax collectors, and that he could not repossess himself of them for the purpose of extending the additional tax. This fact existed when the alternative writ was issued, and should have been embodied in the return to that writ, so that the court might have disposed of the case on a full knowledge of all of the facts.³ An ille-

¹ State v. Bailey, 7 Iowa, 390.

² Cullem v. Latimer, 4 Texas, 329. It was said, however, by Lord MANSFIELD in Rex v. Lyme Regis, 1 Doug. 181, that "There is a great difference between a charge as a ground of disfranchisement and an indictment. In criminal prosecutions technical forms are established and ought to be followed. If in an indictment you say that A. forged and caused to be forged, the proof of either fact will support the indictment; but to say that he forged or caused to be forged, would be bad,

This being determined, must be adhered to. But such nicety is not required in accusations against a corporator in a corporate court. There substantial certainty is all that is necessary."

³ People v. Salomon, 54 Ill. 39. An objection to the return in this case was, that an official cannot excuse his disobedience to a command of the court by setting up his own previous disobedience to a command of the legislature by which he has put it out of his power to obey the command of the court.

gal expulsion from membership in a corporation being in the nature of a penal offence, the return to a writ of mandamus to reinstate the relator in the rights and privileges of membership is governed by stringent rules. It must set forth distinctly all the essential facts, both as to the cause of the disfranchisement, specifying the particular instances of violation of duty as charged, and the form and nature of the proceedings, or it will be bad on demurrer.¹ Where the by-law under which the relator was expelled was express that the expulsion must be founded "on sufficient evidence," and the return merely stated that the relator was found guilty, a demurrer to the return was sustained and a mandamus granted.² It is sufficient in a return to aver generally that the relator duly resigned his office, such an averment implying all that is essential to a resignation. When a party delays more than two years any proceedings for a restoration to office, and apparently acquiesces in an illegal motion, without offering meanwhile to perform the duties of the office, the inferences are strongly against there being any such merits in the case as will warrant a mandamus to restore him.³

The defendant is not bound to take any notice of supposed facts. The court will not, for the purpose of invalidating a return, presume possible, nor indeed probable facts. A return is sufficient when it contains a full and certain answer to all of the allegations expressly made, and discloses a fair legal reason why there should not be a mandamus.⁴ It is not essential to support a return that every part of it should be good. It is sufficient if enough is made to appear to constitute a full justification, or a good legal reason why the mandamus ought not to be enforced.⁵

¹ Com. v. Guardians of the Poor, 6 Serg. & Rawle, 469; Com. v. German Soc., 15 Pa. St. 251; Com. v. Philanthropic Soc., 5 Binney, 486.

² Society, etc., v. Com., 52 Pa. St. 125.

³ People v. Board of Metrop. Police, 26 N. Y. 316.

⁴ Springfield v. Commrs. of Hampden, 10 Pick. 59.

⁵ Legg v. Mayor, etc., 42 Md. 203.

The return is a waiver of all objections to the petition and writ.¹ Accordingly, where the service of an alternative mandamus was objected to as irregular and insufficient on the ground that it was made on the individual members of the county court when the court was not in session, it was held that the irregularity was waived by appearing and submitting to make a return to the writ.² But if the return is quashed, or if no return is made, the allegations of the petition are not to be taken *pro confesso*, nor is the judge authorized to enter judgment as by default for want of an answer, or by *nil dicit*. The case must be heard and the mind of the court be satisfied, both as to the law and the facts, before a peremptory writ can be ordered.³

§ 415. Traverse of return.—At common law, a return to a mandamus in the alternative is to be taken as true, and the aggrieved party is left to his action for a false return.⁴ It was held in Maryland that if a return to an alternative mandamus stated with precision and certainty facts which were sufficient in law to justify the court in refusing the writ, the facts alleged were not traversable, but that whether they were true or false the return was conclusive, and the writ must be denied.⁵ In England, before the statute of 9 Anne, ch.

¹ McCoy v. Justices of Harnett Co.,
⁴ Jones N. C. 180.

² McBane v. People, 50 Ill. 503.

³ Legg v. Mayor, etc., *supra*. When the return to an alternative mandamus is not frivolous, contemptuous, or manifestly bad on its face, but contains matter inviting judicial consideration, the practice is not to dispose of the case in the summary manner of quashing the return, but to put the prosecutor to his demurrer. Silverthorne v. Warren R.R. Co., 33 N. J. 173.

⁴ Com. v. Commrs. of Lancaster, 6 Binney, 5; Com. v. Clark, 9 Serg. & Rawle, 59; Board of Police v. Grant, 9 Smedes & Marsh, 77.

⁵ Harwood v. Marshall, 10 Md. 451.
“Where the return is made by several, the action being founded on a tort, it may be either joint or several. And though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made; and though the writ be directed to the mayor and aldermen, and the return be made in their name, yet the action for a false return may be brought against the mayor alone; but, in such case, if it appear on evidence that the defendant voted against the return, but was overruled by the majority, the plaintiff will be nonsuited. But it seems that the

20, if the party to whom the writ was directed made a return sufficient in law, however false in point of fact, the court could not award a peremptory mandamus until the return was falsified in an action or information. It was, however, provided by that statute that it should be lawful for the person or persons prosecuting a mandamus to plead to or traverse all or any of the material facts contained in the return; to which the person or persons making the return might reply, take issue, or demur; and that such further proceedings should be had therein as might have been done if the person or persons suing the writ had brought an action on the case for a false return. Similar statutes have been enacted in some of the States.¹ In New York it is optional with the relator to demur or plead to all or any of the material facts contained in the return.² An alternative mandamus was served upon the defendants, to which they made their return. To this return the relators elected to plead before a judge without a jury, and a peremptory mandamus was granted, from which an appeal was taken. The appellate court held that by pleading to the return, the relators admitted that the return was a sufficient

plaintiff, before he brings this action, must procure judgment, to be entered on the return, and declare upon that. In an action for a false return, the court is not to inquire whether a mandamus ought to have been granted or not. It is enough that the mandamus was actually granted, and that the return was false. Where several have joined in suing the mandamus, they must all join in the action for a false return, because the damages are joint, and the expenses of suing the mandamus are joint. If in such action or information the return be falsified, the court will grant a peremptory mandamus. A writ of error lies on the judgment in an action for a false return,

and, while it is depending, operates as a supersedeas to a peremptory mandamus, which consequently cannot issue until the question be ultimately determined in favor of the plaintiff in the action." 2 Kyd on Corp. 363, 364.

¹ People v. Commrs. of Hudson, 6 Wend. 559; People v. Beebe, 1 Barb. 379; Maddox v. Graham, 2 Metc. Ky. 56; School Inspectors v. People, 20 Ill. 525; State v. Lusitanian Soc., 15 La. Ann. 73. See Hardcastle v. Md., etc., R.R. Co., 32 Md. 32.

² People v. Board of Metropolitan Police, 26 N. Y. 316. When the truth of the return is traversed, the granting of a peremptory mandamus is dependent upon the judgment.

answer; and, as no material fact stated in the return was disproved on the trial, the order was reversed, and judgment given for the defendants.¹

§ 416. Costs.—Costs do not follow judgment as a matter of course, either on the granting or refusing to grant a writ of mandamus, or other like writ, resting in the discretion of the court.² But where notice of a motion for a mandamus is given to the adverse party which he opposes rightfully, and the law is clearly against the relator, costs follow the denial of the motion.³ Upon an application for a mandamus to compel delivery of the books and papers belonging to the office of superintendent of a corporation, and to admit the relator to the enjoyment of all of the rights incident to that position, it was at first decided that a peremptory mandamus must issue. But it subsequently appearing, upon a supplemental answer, that the defendant after the filing of his first answer was legally appointed to the situation claimed by the relator, the writ was refused, with costs to the relator incurred in the proceeding up to the time of the filing of the supplemental answer.⁴

¹ People v. Finger, 24 Barb. 341. Under the Constitution of the United States (art. 7 of the amendments) providing that in suits at common law when the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, parties are entitled to such a trial where there is an issue as to damages. Chamberlain v. Warburton, 1 Utah, 267.

² Myers v. Pownal, 16 Vt. 426; People v. Supervisors of Columbia, 5 Cowen, 251; People v. Densmore, 1 Barb. 577.

³ Root, *ex parte*, 4 Cowen, 548.

⁴ Curtis v. McCullough, 3 Nevada, 202. There is no case for an appeal or writ of error from an order overruling a motion for a mandamus. Shreve v. Livingston Co., 9 Mo. 195. But it is otherwise as to an order that a mandamus be issued. People v. Seymour, 6 Cowen, 579; Harwood v. Marshall, 9 Md. 83. In South Carolina an appeal may be taken from either an alternative or a peremptory mandamus; but the appeal in neither case acts as a supersedeas. Pinckney v. Henegan, 2 Stroh. 250.

CHAPTER XXV.

DISSOLUTION OF CORPORATIONS.

<ul style="list-style-type: none">§ 417. Exercise of the right.418. Surrender of corporate franchises in general.419. How a corporation may surrender its franchises.420. Surrender by majority.421. The surrender of the charter must be accepted by the State.422. Dissolution by death of members, or loss of integral part.- 423. What will not constitute corporate dissolution.424. Legislative control over public corporations.425. Inviolability of charter of private corporation.	<ul style="list-style-type: none">§ 426. Reservation by legislature of power to repeal or change charter.427. Grounds of forfeiture of corporate franchises.428. When a judgment of forfeiture will not be rendered.429. Waiver of forfeiture.430. The fact of forfeiture cannot be tried collaterally.431. Judicial determination of forfeiture.432. Equity jurisdiction.433. Proceedings to enforce forfeiture.434. Effect of dissolution.435. Rights of creditors and corporators.436. Renewal of corporate powers.
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§ 417. Exercise of the right.—That there is nothing in the nature of the franchise or privilege of being a corporation which renders it incapable of withdrawal or extinction, is shown by the definition and description which have been given of it. The idea that a corporation may be dissolved has been familiar to the English law from the earliest times. The order of Templars was created by Pope Honorius in the year 1120, its object being to guide Christian pilgrims to the Holy Land, of which the Saracens and Turks had taken possession. The members of the order, however, never went there, but dispersed themselves in different parts of Christendom ; and as the end of the institution had not been answered, the order was dissolved by Clement the

Fifth, in 1311. In 1324 the Parliament of England passed a statute reciting the dissolution of the corporation, and the fact that the king (Edward the Second) and several lords had entered on all of its lands. The judgment of Parliament was, that the order was well dissolved, and that the lords were entitled by escheat. By this statute the lands were settled on the hospitallers.¹

Formerly in England "it was a rather common occurrence for proceedings to be instituted by the crown against corporations for misusing their franchises, or against individuals for usurping such privileges. State reasons were generally the motive cause. The municipal corporations during the middle ages, and till a period at least as late as the revolution of 1688, formed one of the chief mainstays of English liberty. The sovereigns encouraged them as the centres of trade, and repressed them by every means when they attempted to make subservient to political objects the great power which the union and periodical meetings of their members gave them. Other incentives there were too which prompted the almost continual interference of the crown with the corporations. Every addition to the importance and strength of them was assumed to be an encroachment upon and a diminution of the prerogative. Moreover, the fines imposed upon corporate bodies, and often upon the luckless corporators themselves, were a lucrative source of revenue. However, with the increase of individual freedom, and protection for the expression of individual opinions, the political importance of these bodies has greatly diminished; consequently seldom, if ever, does the crown now attack them for an encroachment upon its own privileges, or for any other reason of offence to itself. When the crown does intervene, it is rather the State than the sovereign personally; the cause is detriment, actual or apprehended, to the public interests."²

¹ See 2 Kyd on Corp. 446.

Am. Ed. 788, 789. Stephens in his

² Green's Brice's Ultra Vires, 2d commentaries on the laws of England,

§ 418. Surrender of corporate franchises in general.—Although the power of a corporation to surrender any of its subordinate franchises when not expressly prohibited from doing so, is said never to have been questioned, yet its right to voluntarily put an end to its corporate existence was at one time earnestly denied, especially by counsel for the defense in the case of the *quo warranto* against the city of London in the reign of Charles the Second;¹ though Kyd says that “Few cases have occurred on this subject, and in those that have, it does not seem to have been doubted but that the corporate existence might be surrendered; the question has in general turned on the terms of the surrender, and the extent of their signification.”²

In this country, the power of a private business corporation to dissolve itself by its own assent has been recognized in numerous cases. In *Treadwell v. Salisbury Manf. Co.*³

says: “The exertion of this act of law for the purpose of the State in the reigns of King Charles and King James the Second, particularly in revoking the charter of the city of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular. But the judgment against the charter of London was repealed by act of Parliament after the revolution, and by the same statute it is enacted that the franchises of the city of London shall never more be forfeited for any cause whatever.” See *Board of Comms. v. State*, 9 Gill, 379.

¹ 1 Ld. Raym. 497; 3 Burr. 1323. See *Case of Dean & Chapter of Anderson*, 3 Co. 73; *Case of Tayward & Fulcher*, Sir W. Jones 166.

² Kyd on Corp. 466. Kyd further says: “Whether such a surrender shall be permitted by the law is a matter of mere political consideration; and the negative does not seem to have been es-

tablished by the law of England. If it were, it would, notwithstanding, be impossible to prevent the natural effect of such a surrender actually made. It would no doubt be a breach of trust in the acting part of the corporation to make such a surrender without the authority of the major part of all the individual members; but unless the latter had by the original constitution of the corporation the power of supplying the place of the former by an election from among themselves, I do not see how the effect of a complete destruction of the corporate existence could be prevented.” *Ibid.* See *Rex v. Amery*, 2 Term Rep. 531, 532; *Butler v. Palmer*, 1 Salk. 191; *Rex v. Gray*, 8 Mod. 361; *Rex v. Bridgewater*, 11 Id. 291; *Newling v. Francis*, 3 Term Rep. 196; *Rex v. Miller*, 6 Id. 277; *Ward v. Society of Attorneys*, 1 Collyer, 370; *Bank of Switzerland v. Bank of Turkey*, 5 Law Times N. S. 549.

³ 7 Gray, 393. See *Wilson v. Proprs. of Cent. Bridge*, 9 R. I. 590.

the court said that it entertained no doubt of the right of a corporation established solely for trading and manufacturing purposes, by a vote of a majority of its stockholders, to wind up its affairs and close its business if in the exercise of a sound discretion it deemed it expedient to do so ; that at common law the right of corporations, acting by a majority of their stockholders, to sell their property was absolute, and was not limited as to objects, circumstances, or quantity ; that to this general rule there were many exceptions arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters ; that corporations established for objects *quasi* public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, might fall within the exception ; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged ; that such corporations might perhaps be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process ; but that it was not so with corporations of a private character established solely for trading and manufacturing purposes in whose business or its management neither the public nor the legislature had any direct interest.

Suffering an act to be done or omitted which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to doing an act which produces the same consequences.¹ In an early case in New

¹ Matter of Brooklyn, etc., R.R. Co., v. Twaddell, 18 Hun, 427; Barren 72 N. Y. 245; Merchants' & Planters' Ditching Co. v. Beck, 99 Ind. 247; Line v. Waganer, 71 Ala. 581; Oakland Briggs v. Cape Cod, etc., Co., 137 R.R. Co. v. Oakland, etc., R.R. Mass. 71; State v. Barron, 58 N. H. Co., 45 Cal. 365. See Building Assoc. 370; Kansas City Hotel v. Saur, 65 v. Martin, 13 N. J. Eq. 427; People Mo. 288. Where a statute provided

York in which it appeared that all of the property of the corporation had been sold under an execution, and that the corporation had ceased from acting before the bringing of the suit, the court said : "The bill charges substantially that the corporation is dissolved, and not one of the respondents asserts that it does exist, or that there is the remotest idea of resuscitating it. Here, then, is a corporation possessed of nothing, abandoning the end and object of its institution without pretending that there is any hope or expectation of ever resuming its functions ; and it may be added, all the corporators either admit the dissolution of the corporation, or deny that they are corporators ; thus presenting the phenomenon of a corporation without corporators, a nominal inert body pretending to have life and existence. Such an anomaly cannot be recognized. Though the act of incorporation provides for an existence for a term of twenty years, the legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period *nolens volens*. In point of good sense this corporation was dissolved, within the meaning and intent of the act as regards creditors, when it ceased to own any property real or personal, and when it ceased for such a space of time from doing any one act manifesting an intention to resume its corporate functions. With respect to the period of the dissolution, it happened on the day when all the property of the company was sold ; for since that time no corporate act has been done."¹ In a case in Pennsyl-

that if any corporation should neglect and cease to carry on its business for a period of six months, its corporate powers should cease, it was held that, in the absence of specific directions to the contrary, the dissolution took effect at once, only so far as to deprive the corporation of the power of engaging in new business ; but, for the purpose of completing unfinished business and winding up its affairs, it continued to

exist as long as it might be necessary, or until it expired by lapse of time, or was declared dissolved by the judgment of a competent court. Wallamet Falls Canal & Lock Co. v. Kittridge, 5 Sawyer, 44.

¹ Sree v. Bloom, 19 Johns. 456, per SPENCER, C. J., delivering the opinion of the New York Court of Errors, reversing the decision of the chancellor.

vania the Supreme Court of that State said that the general right of a private corporation to surrender its franchises might possibly have exceptions, but that it was undoubtedly the rule ; that it was generally described as an inherent right which would necessarily defeat any attempt by legislation to enforce upon a corporation qualities of perpetuity ; that corporations, like individuals, died by the decay or loss of their vital functions ; that a surrender of a franchise was the voluntary death of the corporation, and was one mode by which it might cease to exist ; that if any one disputed the right of a corporation to surrender its franchise of its own mere motion, it was not likely that such a contest about the question could be long maintained where both parties, the State and the corporation, the grantor and grantee, consented to it, absolutely or on condition.¹ A company organized on the 29th of March, chose officers and recorded its proceedings. On the 4th of June following it concluded to begin anew, and it again organized under an act of incorporation, chose a new set of officers, and commenced its records in another book. The claims of the plaintiffs arose out of transactions between March 29th and June 4th. It did not appear that either of them were at the meeting of June 4th, but each afterward subscribed for shares. The court instructed the jury that if the plaintiffs on June 4th did understandingly, knowing the effect of what was done, and voluntarily consenting thereto, intend to surrender their claims upon the company, they must find for the defendant ; but that if they came to the conclusion that the plaintiffs did not intend to surrender, discharge, or affect any of their claims against the corporation by consenting to a new organization of it, they should find their verdict for them. It was

¹ *Houston v. Jefferson College*, 63 Pa. Clergy Soc., 10 Rich. Eq. 604; *Savage St.* 428. See *Washington, etc., Turnp. v. Walshe*, 26 Ala. 619; *Graham v. R. v. State*, 19 Md. 239; *Webster v. Railroad Co.*, 102 U. S. 148. *Turner*, 12 Hun, 264; Atty. Genl. v.

held that this instruction was correct.¹ In an action brought by the creditors of a railroad company against the sole remaining officer of the company competent to act as a trustee under the statute in relation to dissolved corporations, the petition showed that the company had held no election for the choice of officers for the nine years preceding; that only one of the officers elected at that time was in a position to act as a trustee under the statute; that the road had gone to decay and been abandoned; and that the State had foreclosed its lien, sold out the road, rolling stock, and other property of the corporation, also its corporate rights and franchises. It was held that the facts alleged sufficiently showed a dissolution of the corporation by a practical surrender and abandonment of its corporate rights and franchises.² Where an act provides for the institution of a suit against a corporation with the view to a forfeiture of its charter, and declares that upon a rendition of judgment in favor of the State the other provisions of the act shall have full force and effect, the corporation can dispense with the judicial proceeding by a surrender of its charter. It is, of course, competent for the State to resume at any time with the assent of a corporation its franchises, and provide for the winding up of its affairs.³

§ 419. How a corporation may surrender its franchises.— When the statute prescribes a particular method for dissolving a corporation, that method must be pursued; but in the

¹ Longley v. Longley Stage Co., 23 Me. 39.

² Moore v. Whitcomb, 48 Mo. 543. A railroad company, as a private corporation, may abandon its charter and dissolve itself; except so far as its creditors may have a right to object, and so far as its public duties as conservators of a highway may tend to limit its power in this respect; and the legislature may at pleasure release it

from limitation and allow a transfer of its duties to other hands. Lauman v. Lebanon Valley R.R. Co., 30 Pa. St. 42.

³ Savage v. Walshe, 26 Ala. 619. When a corporation stops doing business, leaving debts unpaid, is insolvent, and unable to prosecute the work for which it was organized, the court may dissolve it. St. Louis, etc., Coal & Mining Co. v. Sandoval Coal & Mining Co., 116 Ill. 170.

absence of any statutory provision defining the mode, a corporation may surrender its franchise ; acts clearly indicating such an intention will be sufficient. When in the case of a corporation for literary purposes there are no stockholders to be consulted, the president and trustees of the institution may decide whether or not the public interest would be subserved by dissolving the corporation and devoting its property, after the payment of its debts, to the support of a new and kindred institution, to be established under more auspicious circumstances, and with a more liberal endowment. The fact that a portion of the funds were the result of voluntary unconditional donations, does not impair the power of the trustees to surrender the franchise and dispose of the corporate property in the manner proposed, the donors being presumed to have known the law, and to have assented in advance to any lawful exercise of power by the president and trustees in respect to the corporate franchise and property.¹

When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument to which they owe their corporate being. Where, however, the whole body of corporators, or stockholders, or other persons in interest compose the corporation, the right of assenting to any proposed change in the charter resides in them, though ordinarily represented by a board of directors charged with the exercise of corporate powers. The latter in their capacity of managers have no authority either to call for or assent to a change of the corporate constitution but by the agreement of the corporators. Yet a long acquiescence by the members in acts and declarations of the trustees recognizing the change, might constitute conclusive evidence of assent to it. The mere omission of the stockholders to assemble in formal meeting, for

¹ People v. College of California, 38 Cal. 166.

a short period, for the purpose of electing other trustees, would afford no presumption of assent sufficient to fasten upon them radical changes of the charter.¹ A dissenting member cannot be forced into a new corporation and his property in one corporation be taken from him and the stock of another imposed upon him by way of compensation, by the act of either the legislature, or of his co-corporators, or of both combined. The act of dissolution, like the act of association, is not a corporate act, but an act of the members of the corporation. They may commit to their officers the business of effecting it in all its details, but, in doing so, the officers are rather trustees of the members than corporate functionaries. Hence no corporate act can settle the terms of dissolution, or distribute the effects among the members, nor can the corporation decide what a member shall take for his interest.²

When a corporation has no particular mode pointed out for closing its concerns, it may make an assignment with the assent of the stockholders, which, if valid, will be equivalent to a surrender of the charter.³ Where a corporation not being in debt, with the consent and approval of all of its stockholders, sold its entire property and effects with the intent and for the purpose of discontinuing its business, by a resolution declared itself dissolved, and did no business afterward, it was held that these acts, which had the effect to destroy the end and object for which the corporation was created, were equivalent to a surrender of its corporate rights, and that the fact that the resolutions authorizing the sale and declaring the corporation dissolved were adopted by the stockholders and not by the directors, did not impair their force as an act of surrender.⁴ The secretary of a loan fund associa-

¹ Com. v. Cullen, 13 Pa. St. 133.

² Bank Commrs. v. Bank of Brest,

³ Lauman v. Lebanon Valley R.R. Harring. Mich. Ch. 106.

Co., 30 Pa. St. 42.

⁴ Webster v. Turner, 12 Hun, 264.

tion purchased and took assignments of all of the bonds, mortgages, and assets of the corporation, and of all of the unredeemed shares of its members. In this condition of things, there was no longer a quorum of members for the transaction of business, and no meetings could be held to which the members could appeal from the entries of the secretary, which were declared by the by-laws to be *prima facie* evidence, nor for the election or removal of officers, nor for any other corporate object or purpose. It was held that this amounted to a complete suspension, at least, if not to a final dissolution, of the corporation by the unanimous consent of all of the members.¹ A merger of one corporation into another, when authorized by law, is a dissolution, destroying the actual identity of both, and while the legal identity of the one which retains its original name is preserved, the legal identity and corporate existence of the other is lost; as where a life estate is merged in a fee simple, one being destroyed and the other enlarged by the operation.² "A corporation is an existence, owing all its qualities, powers, and capacities to the law. The law which calls it into being has also appointed the manner in which its existence shall be determined, but it has not been said that it may commit civil suicide. In whatever mode,—by surrender or forfeiture of the charter, by winding up, etc., —a corporation be ended, it is found that the law, *i. e.* the State, intervenes. A corporation is something distinct from its members; all these may leave it, yet it still exists. How, then, is it possible that any action of theirs, unrecognized by the law, can destroy that which depends for its origin and continuance on the law alone? But, though a corporation cannot directly put an end to its existence, and merge it, by any process of amalgamation, in that of another, yet it may accomplish this in an indirect

¹ Cook v. Kent, 105 Mass. 246.

² Lauman v. Lebanon Valley R.R. Co., 30 Pa. St. 42.

and circuitous manner. It may do so by transferring its property, funds, rights, and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding up. Generally, the arrangement is supplemented by a proviso, whereby the transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect of claims, existing or prospective. This, after all, is not an amalgamation. It is not a union of one corporation with another, but is simply a transfer of assets, with attendant responsibilities. It is, however, a sufficient amalgamation for all practical purposes, and it is therefore the process always adopted."¹

A corporation whose term of existence is limited in the act which creates it, cannot endure beyond the prescribed time, unless prolonged by the same authority, or continued for the purpose of adjusting and closing its business. The expiration of the time ends the life given to the artificial body, as death terminates the life of a natural person.² But when the continuance of a corporation beyond a fixed time is made to depend upon the performance of a given condition, the non-performance of the condition is a mere ground of forfeiture.³

§ 420. Surrender by majority.—At common law, when a number of persons associate themselves as partners in business for a time specified in the agreement between them, or become members of a corporation for definite purposes and objects named in the charter, the objects and business of the partnership or corporation cannot be changed, abandoned, or sold out within the time, without the consent of

¹ Green's Brice's Ultra Vires, 2d Am. Ed. 608. See Anglo-Australian Co. v. British Provident Ins. Co., 4 De G. F. & J. 341; Western Life Assoc., *ex parte*, L. R. 11, Eq. 164. of Miss. v. Wren, 3 Smed. & Marsh, 791; Asheville Division No. 15 v. Aston, 92 N. C. 578. See St. Louis Gas Light Co. v. St. Louis, 84 Mo. 202.

² People v. Walker, 17 N. Y. 502; Sturges v. Vanderbilt, 73 Id. 384; Bank ³ Lagrange & Memphis R.R. Co. v. Rainey, 7 Coldw. Tenn. 420.

all of the partners, or corporators.¹ But the majority of corporators, under a charter which specifies no definite time for its continuance, may abandon the undertaking, and dispose of the corporate property.² The Salisbury Manufacturing Company having been duly incorporated, sometime afterward another corporation was chartered of the name of the Salisbury Mills, for the purpose of manufacturing the same kind of goods as that of the first-named corporation. It was composed mainly, if not entirely, of persons who were also officers and stockholders in the Salisbury Manufacturing Company. All of the directors of the first company were stockholders in the second, and all but one of them directors in the second company. At a meeting of the stockholders of the first company, it was voted by a majority, contrary to the wishes of the minority, and against the protest of the plaintiff, that the directors should have authority to sell all or any part of the property and privileges of the company, and that, if the sale was made to the second company, the stockholders of the first company, at the time of such sale, should be entitled to an interest in the new one in proportion to their interest in the first company. The Supreme Court of Massachusetts said : "Under the circumstances found in the case before us, we see no reason to doubt that it was in furtherance of

¹ Zabriskie v. Hackensack, etc., R.R. Co., 18 N. J. Eq. (3 C. E. Green) 178; Von Schmidt v. Huntington, 1 Cal. 55.

² Black v. Delaware, etc., Canal Co., C. E. Green (22 N. J. Eq.) 130. In Massachusetts, the statute of 1852, chapter 55, provided that if the majority in number or interest of a corporation wished to close the corporate concerns, they might apply to the Supreme Court, setting forth the grounds of their application, and the court could, for reasonable cause, decree a dissolution. It is not a sufficient reason for

the dissolution of a corporation under this statute, on the petition of a majority in number of the stockholders holding a minority of the stock, that one man, owning a large majority of the stock, has so managed the concerns of the company that it has for a number of years been doing a losing business; that he has refused to make any change in the business, or to purchase the shares of the petitioners; and that if the affairs of the corporation were skilfully managed, it might be made a source of profit to all of the stockholders. Pratt v. Jewett, 9 Gray, 34.

the purposes of the corporation, to pay its debts, close its affairs, and settle with the stockholders on terms most advantageous to them. Nor can we see anything in the proposed sale to a new corporation, and the receipt of its stock in payment, which makes the transaction illegal. It is not a sale by a trustee to himself, for his own benefit; but it is a sale to another corporation for the benefit and with the consent of the *cestuis que trust*, the old stockholders. Being done fairly, and not collusively, the transaction is not open to valid objection by a minority of the stockholders."¹ A majority of the directors, and the owners of more than three-fourths of the stock of an insurance company, applied to the New York court of chancery, under the provisions of the act of New York of April 5, 1817, for a dissolution of the corporation, on the ground that it was for the interest of the stockholders. The owners of about one-ninth of the stock remonstrated against the resolution of the company, and some of them testified to their belief that the business of the company might be made profitable. The residue of the stockholders neither applied for the dissolution nor made any objection to it. It was held that the court, in deciding upon the propriety of a dissolution in the cases provided for in the act, should exercise its discretionary power and decree a dissolution under the same circumstances as would induce the legislature to repeal the charter on the application of the directors; that the court was not bound to decree a dissolution merely because a majority of the directors and stockholders requested it; but that when the owners of a very large proportion of the stock found it for their interest to vest their capital in something more productive, it was strong evidence that the interests of the stockholders generally would be promoted by allowing them to withdraw their capital and discontinue the business

¹ Treadwell v. Salisbury Manf. Co., 7 Gray, 393.

of insurance; and that the fact that insurance stock where the capital was perfectly sound was below par in the market, was of itself strong proof that the capital of such companies might be employed more profitably, or at least more safely, in some other business.¹ It has been held that where the purposes of incorporation cannot be accomplished, and the capital has been exhausted in endeavors to go on leaving no further means, one stockholder cannot by his dissent prevent a surrender of the franchise to the State against the prayer of all of the other members of the corporation.²

¹ Matter of Niagara Ins. Co., 1 Paige Ch. 258. The act above referred to provided that whenever the directors of any incorporated insurance company in the city of New York, or a majority of such directors, should deem it necessary or beneficial to the interests of the stockholders to dissolve the corporation, such dissolution might be decreed by the chancellor of the State upon a petition and notice to show cause for that purpose. The provisions of this act remained in force until 1880, when they were repealed. See New York Rev. Sts., 4th Ed., vol. 2, p. 709; Id., 7th Ed., vol. 3, p. 2399; New York Session Laws of 1880, ch. 245.

Under a statute of Pennsylvania the court of common pleas of the proper county may grant the petition of a corporation, with the consent of a majority of the meeting of the corporators duly convened, praying for permission to surrender any power contained in the charter, or for the dissolution of the corporation, provided that no property devoted to religious, literary, or charitable uses shall be diverted from the objects for which it was given or granted. Com. v. Slifer, 53 Pa. St. 71. The charter of an insurance company provided that, upon a vote of stockholders owning two-thirds of the whole

amount of stock subscribed that the company should discontinue its business, it should be the duty of the directors to cease from assuming any new risk and to wind up the affairs of the company as speedily as possible, and that upon this being accomplished, the corporation should cease and be dissolved. It was held that after such a vote, there was no power to reconsider it, but that it was final and irrevocable except by the legislature, and that business transacted after that by the company, except for the purpose of winding up its affairs, was unlawful. Green v. Seymour, 3 Sandf. Ch. 285. See U. S. Rev. Sts., sec. 5220.

² Wilson v. Cent. Bridge Co., 9 R. I. 590; Matter of Pyrolusite Manganese Co., 29 Hun, 429. In the Matter of the Suburban Hotel Co., L. R. 2, Ch. 737, Lord CAIRNS said: "If there be insolvency, or anything which is equivalent to a test of insolvency, if there be the circumstances that the company has not for a certain time commenced business, or has suspended business, that is a test given to the court by which to prove that the business cannot be carried on, and in those cases the company may be wound up. It is not necessary now to decide it; but if it were shown to the court that the

The statute of Massachusetts which authorizes a majority in number or interest of the members of a corporation to apply for its dissolution, was intended to apply only to corporations established for purposes of private gain or benefit, or for some specific object or purpose in which the corporate property is vested in definite shares or proportions exclusively in the stockholders or members, who by the duly ascertained will of the majority have the right not only to control and manage it, but to dispose of it absolutely for the use of themselves and their associates. The corporation of "The Proprietors of the New South Meeting House in Boston," was founded in part by contributions of those who intended to become beneficial owners of the property as pew-holders or members, they having no expectation of personal benefit or advantage, but giving money for the special purpose of aiding in the erection of a house of worship for the use of a religious society under a grant of land from the town on the express trust that it was to be appropriated to such purpose. Property so given cannot be justifiably taken and appropriated either by a majority of the trustees, or of the *cestuis que trust*, to a purpose wholly foreign from that for which it was originally intended to be used.¹ A majority cannot assign or exchange the interest

whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the court might, either under the act of Parliament, or on general principles, order the company to be wound up. But what I am prepared to hold is this, that this court, and the winding up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation. This company may become successful, or may continue to be unprofit-

able, as I believe it has hitherto been; and it may, therefore, hereafter reappear in this court under different circumstances, but it is not for this court now to pronounce, and, above all, not for this court to pronounce on opinion evidence, that this is likely to be an unprofitable speculation, and that therefore at the wish of a minority of shareholders, against the will of a large majority, the company should be wound up." See Folger v. Columbian Ins. Co., 99 Mass. 267.

¹ *In re* New South Meeting House, 13 Allen, 497; Treadwell v. Salisbury Manf. Co., 7 Gray, 393.

of a stockholder in the corporate assets without his consent;¹ nor prejudice the vested rights of their co-corporators by any act foreign to the objects of the corporation. As a general rule, the question as to the forfeiture or dissolution of charters is one which concerns the public, and the corporation is presumed to exist for all purposes of justice until the forfeiture is declared by the judgment of a court in some proceeding in which the State is a party.² Where an act of the legislature in terms authorized a corporation to assign to another corporation all the rights, powers, privileges, franchises, immunities, and exemptions, held by it under its charter or under any other law of the State, as well as the stock subscribed, upon such terms and conditions as should be agreed upon by the board of directors, provided that the act should be accepted by the stockholders representing a majority of stock subscribed, it was held that it amounted simply to a legislative permission to accept the proposed amendment if the corporation should choose to do so, but not to invest a majority with power to accept the amendment so as to bind the stockholders who did not assent to it.³ The plaintiff was a stockholder and trustee in a corporation organized for the purpose of manufacturing hard rubber goods under the patents of the Goodyears. A majority of the trustees sold to a firm all of the personal property, including tools, dies, etc., and all of the patent rights and privileges under the letters patent belonging to the corporation. The sale was made without the consent and contrary to the wishes of the plaintiff, and against his protest and remonstrance. The stockholders were thus by the acts of their agents deprived of valuable rights, and of all connection with the manufacturing of rubber. The court said: "Trustees

¹ McCurdy v. Myers, 44 Pa. St. & Ohio R.R. Co. v. State, 29 Ala. 535.

573.

² Curien v. Santini, 16 La. Ann. 27; ³ New Orleans, etc., R.R. Co. v. Polar Star Lodge v. same, 53; Mobile Harris, 27 Miss. 517.

cannot by their vote and their act change the business of a corporation organized for the making of goods, into a manufactory of articles entirely different, although the business of the company may be named in the charter in terms sufficiently general to include the substituted business. The immediate and necessary act of these trustees was, to terminate the business, and thus practically and effectually destroy the corporation. This they could not do. . . . When the acts of a majority in a corporation are inconsistent with the object and purpose for which the body corporate was organized, they are void."¹ The sale of a railroad, and the appropriation of capital invested in it to other uses, affects the right of every stockholder. The directors are trustees to employ the joint capital solely in the management of the road, to the end that the stockholders may reap from the investment contemplated profits. What the majority may determine, within the scope of the fundamental arrangement, they each agree to abide by; but there their mutual contract terminates, and no majority, however large, has a right to divert any portion of the joint capital to a purpose not consistent with and growing out of the original intention. To sell the road, to abandon the contemplated investment, and embark in another scheme, whether entirely different or only more extensive, would violate the rights of the individual shareholders, who are entitled to have their money devoted to the original use, and not employed in any other, nor returned to them before they desire it. A fundamental alteration of a charter, or material deviation from or extension of a railroad, interferes with the corporate franchise, and no majority can compel any individual stockholders to submit. If this were not so, a man, or a number of men

¹ *Abbot v. Am. Hard Rubber Co.*, 33 Ins. Co., 6 Daly, 455; *Denike v. New Barb.* 578. See *Hardon v. Newton*, 14 York, etc., Lime Co., 80 N. Y. 599. *Blatchf.* 376; *Masters v. Eclectic Life*

of large means, possessing a controlling interest in two roads, whose termini meet, one already successful, the other not built, or needing aid, might compel the poorer stockholders either to abandon or postpone the profitable use of their shares of the capital, or take back their money, and give up an investment which perhaps their own enterprise suggested, and their own perseverance recommended to the attention of others, and hazard the obtaining of a new investment, and a repetition of a similar destruction of it. Where the charter provides that the corporators and their successors shall be capable of purchasing, holding, and conveying any lands, tenements, goods, and chattels, whatever necessary and expedient to the objects of the incorporation, it is only when such objects require it, that any lawful conveyance can be made. It cannot be pretended that the objects of the corporation require that the necessary source of its profitable existence shall be sold and conveyed away.¹

A majority have no right to exercise the control over the corporate management which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails to themselves, or to any of the shareholders, to the exclusion or prejudice of the others.² Where the corporate property was transferred to two shareholders in lieu of their shares, the corporation thereby practically extinguished, and the debts thrown on the remaining shareholders, all of which was sanctioned by a majority, at a general meeting, it was held that the majority could not bind the minority in such a transaction, and it was set aside.³ A majority of the stock of a corporation being held in trust for a city, at a meeting to consider the propriety of a sale

¹ Kean v. Johnson, 1 Stockton (N. J.) Ch. 401. v. Merryweather, L. R. 5, Eq. 464, note; Menier v. Hooper's Tel. Works,

² Preston v. Grand Collier Dock Co., L. R. 9, Ch. App. 350, 354; Brewer v. 11 Sim. 327; Hodgkinson v. Nat. Live Stock Ins. Co., 26 Beav. 473; Atwool Boston Theatre, 104 Mass. 378.

³ Gregory v. Patchett, 33 Beav. 595.

of the corporate property, this stock voted to sell the property to the city for less than was offered at the time by other parties. It was held, that the minority were entitled to a redisposal of the property at public sale, but that the city would be at liberty to bid at such sale, the same as any other stockholder.¹ A majority of the stockholders of a corporation, having a right, under the charter, to dissolve the corporation, dispose of its property, and distribute the proceeds, availed themselves of their power to do so, selling the corporate property and franchises to themselves, at half value. They thrust the minority from their position as stockholders, terminated their relations with the corporation as such, and deprived them of realizing what would have belonged to them upon a fair division. Upon a bill in equity by the dissenting stockholders, in behalf of themselves and of all others who might desire to join them, the substantive allegations were, that, at the time of the foregoing transactions, the complainants were stockholders of a corporation known as the Oregon Steam Navigation Company, which was prosperous, and owned a large and valuable property ; that V., in order to acquire the control of the company and its property for his own benefit, caused another corporation, the Oregon Railway and Navigation Company, to be organized, to which the property of the first-named company was to be transferred ; that he caused himself to be elected president of the new company ; that he then purchased 40,000 shares of the old company, and transferred his purchase to the new company, receiving for himself a large profit by the transaction ; that thereupon he and the new company consummated the design of winding up the old company, of acquiring all of its property and business for the benefit of the new company, and of excluding the minority stockholders of the old company from their just interest in the assets ; that they caused a

¹ Wilson v. Central Bridge Co., 9 R. I. 590.

board of directors favorable to their scheme to be chosen for the old company, by voting the stock owned by the new company, and, under a statute which permitted such a corporation, upon a vote of a majority of the stock, to dissolve and dispose of its property, the defendants procured the dissolution, and sale, and transfer of all of the property and franchises of the old corporation to the new corporation. The prayer for relief was, that the several acts of the defendants complained of be declared fraudulent and void; that the defendants be adjudged to pay the complainants, and such other stockholders as might join them, their proportionate share of the value of all of the property and franchises of the Oregon Steam Navigation Company; that the Oregon Railway and Navigation Company be adjudged to hold the property it acquired, as trustee for the complainants in proportion to their holdings of stock in the former company, and that the complainants be decreed to have a lien thereon. It was held that the complainants occupied substantially the position of creditors of the corporation, seeking to obtain satisfaction of their claim out of the fund in the hands of the defendants, and that they were entitled to maintain the bill.¹

To make a vote in favor of a radical change in the charter valid as the act of the corporation, it should be passed at a meeting duly convened after notice to all of the members. The private procurement of a written assent signed by a majority of the members will not supply the want of a meeting. Such an expedient would deprive those interested of the benefit of mutual discussion, and subject them to the hazard of fraudulent misrepresentation and undue influence. It seems, however, that a written assent,

¹ Ervin v. Oregon R.R. & Nav. Co., 22 Blatchf. 187. If the majority of stockholders have the right to wind up the corporation at their election, and they avail themselves of it in the mode authorized by the charter, neither a court of law nor of equity can inquire into the motives that influenced them. Ibid.

though not executed at a meeting, may be sufficient, if signed by all of the stockholders or parties in interest. The opportunity to deliberate, and if possible to convince their fellows, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority.¹

§ 421. The surrender of the charter must be accepted by the State.—As the charter when accepted is a contract between the State and the corporation, it will be necessary in order to dissolve the latter that the consent of both parties be obtained. If a resolution of the great body of the corporators to surrender is presented to the legislature and assented to in the form of a legislative act, it will be effectual to dissolve the corporation. So an act of the legislature repealing the charter, if assented to by the corporation, will operate as a dissolution. But a corporation cannot by its own act, even by a unanimous vote, effect its own dissolution; this must be done by the concurrence of the parties to the compact, or by the solemn judgment of a court of competent jurisdiction.² The town of S. was incorporated

¹ Com. v. Cullen, 13 Pa. St. 133.

² Town v. Bank of River Raisin, 2 Doug. Mich. 530; Wilson v. Central Bridge Co., 9 R. I. 590; Enfield Toll Bridge Co. v. Conn. River Co., 7 Conn. 28; Boston Glass Manf. Co. v. Langdon, 24 Pick. 49; Harris v. Muskingum Manf. Co., 4 Blackf. 267; Atty. Genl. v. Clergy Soc., 10 Rich. Eq. 604; Campbell v. Miss. Union Bank, 6 How. Miss. 68. See La Grange, etc., R.R. Co. v. Rainey, 7 Coldw. Tenn. 420. In Georgia, the Code requires the surrender of a corporation to be made to the State. The corporators consent to surrender their franchise, tender it back to the legislature, and ask to be dissolved as a corporation. If the surrender is formal, under the corporate seal, and the legislature accepts it, by an act or ordinance in

some authoritative form which is authenticated, the dissolution of the corporation is complete. Mechanics' Bank v. Heard, 37 Ga. 401. In the absence of any provision of law on the subject, it may be that a corporation purely private in its character and objects, and created for the sole benefit of the individual members, could by the act of the corporators be divested of its corporate privileges and existence, on the ground that the assent of the legislature might in such a case be presumed from the nature and object of the charter itself. But a corporation could not by its own act, or that of the corporators, be so dissolved as to discharge it from any contract or liability existing against it. Portland Dry Dock, etc., Co. v. Portland, 12 B. Mon. 77.

in 1843. In 1850 a petition was presented to the county court of the county in which the town was situated, praying that it might be incorporated as "The Mayor and Aldermen of the Town of S," and setting forth the boundaries, which, as described in the petition, enlarged the limits of the town. The application having been granted, it was held that the charter of 1843 was not surrendered by the action of the county court of 1850. The Supreme Court said that in order to make the surrender effectual, it was necessary that it should be accepted by the government, and a record made of the fact.¹ Merely giving notice of the surrender to the executive department of the government will not be sufficient. The enterprise in which a corporation was engaged was unsuccessful, it having made no dividend for four or five years, and lost in that time a considerable part of its capital. The stockholders finally took measures to close the corporate concerns. For this purpose a vote was adopted at a meeting of the corporators appointing a committee to settle and adjust the corporate affairs, to sell the property, collect all outstanding demands, pay the debts, and divide the surplus among the stockholders according to their respective shares. The committee wrote to the executive of the government that it had been voted to dissolve the corporation, and gave notice that the charter was surrendered to the State, except so far as might be necessary in closing the corporate concerns. It was held that the corporation was not dissolved by the foregoing acts.²

¹ Norris v. Mayor, etc., of Smithville, 1 Swan Tenn. 164.

² Revere v. Boston Copper Co., 15 Pick. 351. On the question whether a person not actually a member of, but interested in, a corporation, such as a creditor, can call upon the courts to prevent the corporation from dissolving by the surrender of its charter, or by

any voluntary mode whatever other than by winding up, Mr. Brice, (*Ultra Vires*, 2d Am. Ed. 793, 794,) says: "The creditor may fairly say that he is entitled to the protection of the court in so far as, if at all, it can afford him assistance by putting a stop to proceedings, active or passive, on the part of his debtor, which may interpose ob-

§ 422. Dissolution by death of members, or loss of integral part.—A corporation is dissolved when it has lost the power of perpetuating itself. If by the death or disfranchisement of so many of the members that by the original constitution of the corporation the remaining members cannot continue the succession, the corporate activity is gone, and, to all purposes of action at least, the corporation is dissolved. As if a corporation aggregate consists of a definite number, and be reduced to half that number, so that there cannot be a concurrence of a majority of the original corporators, it can no longer continue the succession, and consequently to many purposes, is dissolved. But no loss of members destroys a corporation so long as a sufficient number remain to fill vacancies.¹ The author of a modern English work says that “Whether a corporation, that is to say, whether the members can allow the corporation to die out, may be considered doubtful, at least as to all such which may be denominated public. The franchises have been granted to these for public ends and aims, and the original intention

stacles to the debtor's discharge of his obligation. Whether this would hold as a general proposition, cannot be affirmed, but, at least, in *Kearns v. Leaf*, 1 H. & M. 681, a relief of this kind was afforded. The plaintiff held a policy in a company, the funds of which were made liable to pay the sum insured and certain shares of profits by way of bonus. The company having entered into an agreement to transfer its business and assets to another company, contrary to the stipulations of its deed of settlement, and without making provision out of its own assets for payment of the plaintiff's policy, *PAGE WOOD*, V. C., granted an injunction at suit of the plaintiff to prevent this agreement being carried out. He considered that the plaintiff acquired under his contract such a species of interest in the funds of the company as would

entitle him to interfere to save the property from being wasted, contrary to the provisions of the deed in accordance with which the plaintiff accepted his policy. No doubt the vice-chancellor did not here decide, any more than did *KNIGHT BRUCE*, V. C., in *Ward v. Society of Attorneys*, 1 Collyer, 370, that a corporation cannot put an end to its existence voluntarily and *proprio motu*, but he did decide that it could not, in doing so, be permitted to prejudice the rights of its creditors, or to derogate from the securities which it gave or held out to them as an inducement for them to contract with it.” See *Law v. London Indisputable Co.*, 1 K. & J. 223; *In re State Fire Ins. Co.*, 1 D. G. J. & Sm. 634; 34 L. J. Ch. 58.

¹ 2 Kyd on Corp. 448; *State v. Vincennes University*, 5 Ind. 77; *Harris v. Miss. Valley*, etc., R.R. Co., 51 Miss. 602.

must have been that they should be used. With regard to corporate offices, it is admitted that by the common law a corporator can be compelled to undertake them when called upon. . . . It would seem that the corporation itself must be compellable to fulfil its duties, and to discharge the purposes for which it has been created, at least whenever such purposes have a distinct and primary reference to the public welfare ; and if compellable to do this, it is apparently compellable to keep up, or at least to make the attempt to keep up, its members, so as not to perish of mere inanition. In the present day, however, there are other ways and means of accomplishing that for which corporations were formerly frequently established to bring about. Consequently it may safely be predicated, that whether it is or not theoretically *ultra vires* of a corporation to allow its members to die out totally, or as to any integral part, the crown at least will not intervene to prevent this. If the members themselves find the duties too onerous, or do not value their privileges sufficiently to keep them alive, neither political necessities nor public needs can now be deemed sufficiently pressing to require that corporations should be made to discharge their functions. This applies even more strongly to private corporations ; that is, to those associations that have been incorporated purely for private aims. In these the privileges and capacities that belong to the whole as distinct from the parts,—that is, the individual members,—belong to them for the private advantage of the latter. Consequently, these may use or not use them, as they think fit, and may allow them to pass into desuetude, and the corporation itself to decay."¹

Where a corporation consists of several distinct integral parts, if one of these parts becomes extinct, whether by the death of the persons of whom it is composed, or by other

¹ Green's Brice's Ultra Vires, 2d Am. People v. Alb. & Vt. R.R. Co., 24 N. Y. Ed., 795, *et seq.* See Rex v. Proprs. of 261 ; Treadwell v. Salisbury Manf. Co., Birmingham Canal, 2 Wm. Blk. 708; 7 Gray, 393.

means, the whole corporation, says Rolle,¹ is dissolved : as if a corporation consists of so many brothers and so many sisters, and all the sisters die, the whole is dissolved, and all acts done, and all grants made by the brothers afterward are void ; because, says he, the brothers and sisters are integral parts of the corporation, and it cannot subsist by halves. But he adds, “ If the king make a corporation consisting of twelve men, to continue forever in succession, and when one of them dies the rest may elect another in his place ; though three or four of them die, yet all acts done by the remaining members are valid, because the members deceased did not constitute a distinct integral part.”² In England the question seems chiefly to have arisen in relation to municipal corporations.

In this country, corporations for civil purposes, which bear little resemblance to the English municipal corporations, are not in general composed of integral parts. If every individual member of an incorporated stock company should die at the same instant, the shares would be distributed according to the statute of distributions, or according to the testamentary dispositions of the deceased, and the distributees would thereby become members of the corporate body. The legal representatives of the deceased members would have authority by law to manage the corporation, and no dissolution would in such case take place. If the shares of the corporation should all centre in one person, and the forms of proceeding or by-laws should prescribe acts to be done by two or more, there would be no difficulty in the sole owner's making sale of shares to conform to the letter of the rule.³ The stockholders constitute the corporate body,

¹ 1 Rolle Abr. 514.

Pick. 52; Evarts v. Killingworth Manf.

² 2 Kyd on Corp. 449. See Rex v. Pick. 52; Evarts v. Killingworth Manf. Co., 20 Conn. 447; Baldwin v. Canfield, Morris, 4 East. 17; Kennet, etc., Navigation Co. v. Witherington, 18 Q. B. 26 Minn. 43; Smith v. Smith, 3 Des-saus. Ch. 557; Newton Manf. Co. v. 531; Rex v. Pasmore, 3 Term Rep. 199. White, 42 Ga. 148; Com. v. Cullen, 13 Russell v. McLellan, 14 Pick. 63; Pa. St. 133; Hoboken Building Assoc. Boston Glass Manf. Co. v. Langdon, 24 v. Martin, 13 N. J. Eq. (2 Beasley) 427;

³ Russell v. McLellan, 14 Pick. 63; Boston Glass Manf. Co. v. Langdon, 24

and the managers and officers are its agents, necessary for the management and supervision of the corporate concerns, but not essential to corporate existence as such, nor forming an integral part. The corporation may exist without them so far as may be requisite to the maintenance of perpetual succession and the holding and preserving its franchises. The non-existence of the managers does not therefore necessarily imply the non-existence of the corporation, which, though dormant and its functions suspended for want of the means of acting, may still be able to restore its functionaries by an election.¹ Where a statute provides that a clerk of the corporation shall be chosen annually, to hold his office until another is chosen and qualified in his stead, a failure to elect a clerk annually will not destroy the legal organization of the corporate body, and render it incompetent to act as such. The statute in this respect is directory merely. The rule is well established that a neglect to com-

Lea v. Am., etc., Canal Co., 3 Abb. Pr. N. S. 1; Muscatine Turn Verein v. Funck, 18 Iowa, 469; Hopkins v. Rose-clare Lead Co., 72 Ill. 373; Button v. Hoffman, 61 Wis. 20; England v. Dearborn, 141 Mass. 590; Mathis v. Morgan, 72 Ga. 517. In Newton Manf. Co. v. White, *supra*, the court said: "The fact, that in an association under the act, one of the stockholders buys up and owns all the stock and property of the balance, and the whole lodges in him, does not deprive such person of the use and rights of the charter to carry on the business under the name adopted; and the fact of being the sole owner, if he goes on and uses such name, does not abate suits at law or in equity filed against such corporation, although individual property. No corporation legally existing dies, in contemplation of law, without some act forfeiting its franchises; but it will be recognized by the law as long as it carries on its legitimate business in its

corporate name, and through agents and persons who use that name in its trade or business. It would be an anomalous doctrine that one should purchase all the stock of such a joint stock company privately, and, without giving notice of such ownership, should carry on the business, use the corporate name, brands, stamps, and trade-marks, and keep books in its name, buy and sell in its name, and be permitted to plead its dissolution when sued by the very name in which it contracted, in violation of the terms of its existence that it could be sued by that name. Every corporation speaks by men, and its artificial existence blends with that of its agents and officers. The corporate name is nothing without the living men who use that name; but when used by those who are its proper agents, it is liable by that name to suit under the provisions of its charter."

¹ Rose v. Turnpike Co., 3 Watts, 46; People v. Twaddell, 18 Hun, 427.

ply with the requisitions of charters and by-laws as to the time of electing officers, does not cause a forfeiture of corporate rights and privileges.¹ A corporation is not dissolved by an omission to elect trustees while the members constituting an integral part of the corporation remain *in esse*, but the old trustees continue in office until others are elected in their stead, even though there is no express provision to that effect in the charter. At all events, if, after a failure to elect, the former incumbents should continue to act, no objection could be taken collaterally that they were not regularly elected at the proper time, or that the corporation was dissolved in consequence. The corporate powers must first be declared forfeited by a proper adjudication in proceedings had for that purpose.² The failure to hold meetings would not *per se* constitute a dissolution of the corporation; nor failure of corporate trustees to attend meetings vacate their seats, in the absence of an express provision in the charter to that effect. It might be a ground on which the seats of the absent trustees could be vacated by electing other persons in their places. But if no such election took place, the negligent trustees might still appear, and, if recognized as such by their colleagues, their acts would be valid.³ The fran-

¹ Knowlton v. Ackley, 8 CUSH. 93.

² Cahill v. Kalamazoo Ins. Co., 2 Doug. Mich. 124. A corporation by omitting to perform a duty imposed by its charter or to comply with its provisions, does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the State. But the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or viola-

tion of its charter or default as to limitations imposed; and whether the legislature has intended so to provide in any case, depends upon the construction of the language used. Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524. Ordinarily the legal existence of a *de facto* corporation can only be inquired into by a direct proceeding brought in the name of the State. Grand Rapids Bridge Co. v. Prange, 35 Mich. 400; Baker v. Neff, 73 Ind. 68; Hon v. State, 89 Id. 249; Williamson v. Kokomo, etc., Assoc., Ib. 389; North v. State, 107 Id. 356.

³ State v. Vincennes University, 5 Ind. 77.

chise to be a corporation may remain, though a particular franchise annexed to it may have been surrendered or forfeited. A corporation may be created with all of the incidental powers of such a body, powers to elect officers, use a common seal, collect tolls, etc., being an entire and invisible body in itself, a franchise which may stand or fall with any one of its powers, and, after having been administered for a time, a particular franchise may be added. The latter being forfeited, there may then arise a question whether it be not so obviously distinct that it may be cut away without impairing the main body. This, it seems, may be done.¹ To question the existence of such annexed franchise, does not therefore necessarily question the existence of the corporation. A corporation was organized for the period of thirty years for the purpose of building and maintaining a bridge across a navigable stream, permission of the board of supervisors of the county, which was authorized by law to fix the tolls, being required before the bridge could be constructed. The assent was given by a resolution of the board "to erect, rebuild, repair, keep up, and use for the sole use and profit of said company, a toll bridge for the term of twenty years." In an action by the corporation to recover tolls for crossing the bridge, it appeared that the bridge was duly constructed and tolls collected from passers during twenty years, but that after the expiration of that period the defendant refused to pay tolls any longer, and crossed the bridge repeatedly without doing so. The court in holding that the defendant was entitled to judgment, said: "The question here in issue is not a question of corporate existence, or a question of forfeiture. The defense may be perfectly valid, and still the corporate existence remain untouched. The corporation was brought into existence by the original organization, and existed before the

¹ People v. Bristol, etc., Turnp. Co., James Smith's Case, 4 Mod. 53; City of 23 Wend. 222, per COWEN, J.; Sir London v. Vanacre, 12 Id. 270.

franchise of taking tolls accrued to it by the action of the board of supervisors. That franchise was an additional privilege to those which the organization gave; it was in the nature of a grant which the organization only clothed the corporation with, the capacity to receive. . . . That franchise was distinct from the corporate franchise, and came into existence by grant not directly from the State, but from the local board. The estate of the corporation in it was expressly limited to twenty years, and when that period came to an end, the estate ceased also. There was no longer color of law for taking tolls; and the failure of the State to institute proceedings, could no more continue the franchise, or restore it to life, than the like failure in the case of one who should erect a gate across a common highway and levy like tolls. When the twenty years expired, the defendant had a right to refuse to pay any longer, and every other person had the like right. If all others acquiesced, their action could not bind the one who refused.”¹

§ 423. What will not constitute corporate dissolution.—A corporation is not dissolved by merely ceasing to exercise its powers;² nor by the disposal of all of the corporate

¹ Grand Rapids Bridge Co. v. Prange, 35 Mich. 400. A corporation clothed with power simply to construct a railroad for any kind of motive power, would receive from the public the franchise only of incorporation. Like a natural person, it would need no public franchise in respect to the railroad. The corporation could locate and build the road where it pleased, if it bought the land and did not infringe rights of third persons. To give the corporation the right to appropriate land for the purposes of its road, it must be empowered to acquire the land under the right of eminent domain, or to use public highways. Sixth Avenue R.R. Co. v. Gilbert Elevated R.R. Co., 41 N. Y. Supr. Ct. (9 Jones & Spencer) 489.

² Rollins v. Clay, 33 Me. 132; Proprs. of Baptist Meeting House v. Webb, 66 Id. 398; Allen v. N. J. Southern R.R. Co., 49 How. Pr. 14; Marble Iron Works v. Smith, 4 Duer, 362; Troy & Rutland R.R. Co. v. Kerr, 17 Barb. 581; Mickles v. Rochester City Bank, 11 Paige Ch. 118; Conro v. Gray, 4 How. Pr. 166; Nimmons v. Tappan, 2 Sweeny (32 N. Y. Super. Ct.) 652; Valley Bank, etc., v. Sewing Soc., 28 Kansas, 423; State v. Barron, 58 N. H. 370; Mosely v. Burrow, 52 Texas, 396; Hollingshead v. Woodward, 35 Hun, 410; Rorhe v. Thomas, 56 N. Y. 559; Harris v. Muskingum Manf. Co., 4 Blackf. 268; Brandon Iron Co. v. Gleason, 24 Vt. 238; Allen v. N. J. Southern R.R. Co., 49 How. Pr. 14; Knowl-

property.¹ Where all of the property of a corporation was purchased by a copartnership, it being the intention of both parties that the charter with the capital stock should be conveyed, so that the property and effects of the corporation might be managed by the purchasers as corporate property under the charter, it was held that the corporation was not thereby dissolved; that the real estate belonged to the corporation as such, and could only be conveyed by its officers under the corporate seal; but that the stock, or the equitable interest in it, belonged to the copartnership under its contract of purchase, subject to the lien of the stockholders for the unpaid purchase money.²

It has been seen, in the preceding section, that the concentration in the hands of a single owner of all of the stock of a corporation does not destroy the corporate rights and franchises. The object being to carry on business under a corporate name, when the business is continued in that name, whether there be one or one hundred owners of stock, the corporate name is equally within the power of

ton v. Ackley, 8 CUSH. 95; Harris v. Miss. Valley, etc., R.R. Co., 51 Miss. 602; Evarts v. Killingworth Manf. Co., 20 Conn. 447; Hoboken Building, etc., Assoc. v. Martin, 13 N. J. Eq. (2 Beasley) 427; Nashville Bank v. Petway, 3 Humpf. Tenn. 522. An act which declares that a private corporation named has forfeited its right to construct a work which the legislature had previously authorized, does not dissolve the corporation. McIntyre Poor School v. Zanesville, etc., Co., 9 Ohio, 203.

¹ Town v. Bank of River Raisin, 2 Doug. Mich. 530; Catlin v. Eagle Bank, 6 Conn. 233; State v. Bank of Md., 6 Gill & Johns. 205; Buell v. Buckingham, etc., Co., 16 Iowa, 284; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Hill v. Fogg, 41 Mo. 563; State Nat. Bank v. Robidoux, 57 Id. 446; Kansas City Hotel v. Sauer, 65 Id.

279; State v. Rives, 5 Ired. 297. When a shareholder sells the corporate property, whether he has authority or not to make the sale, he is liable to the corporation, and not to each shareholder as an individual interested. Hodson v. Copeland, 16 Me. 314.

² Wilde v. Jenkins, 4 Paige Ch. 481. A corporation is not dissolved by the sale of its visible tangible property for the payment of debts, so long as it has the moral and legal capacity to increase its subscriptions, call in more capital, and resume its business. Where the trustees, after such a sale, continued their succession, met and passed resolutions, directed further instalments to be paid in, and denied in their answer that they had surrendered or renounced their trust, it was held that the corporation had not been dissolved. Brinckerhoff v. Brown, 7 Johns. Ch. 217.

the one as of the one hundred, to use for conducting the business. Nor is it necessary that by-laws in fact should have been made, or officers elected. These powers could or could not be exercised at the option of the owner or owners of the stock. The fact that one of the shareholders buys and owns all of the stock and property does not deprive him of the use and rights of the charter; and the fact of his being the sole owner, if he goes on and employs the corporate name, does not abate suits at law or in equity brought against the corporation, although individual property.¹

The refusal of one of two parties composing a corporation to be bound by an agreement made between them in relation to the raising of necessary funds for corporation purposes, and the incurring of obligations will not operate as a dissolution. A charter was granted to W. B., and such other persons as he might associate with him, their successors and assigns, who were constituted a body politic and corporate. W. B. sold and conveyed one-half interest in the franchises and property of the corporation to M., whom he associated with him as a corporator. On the same day W. B. and M. entered into a special verbal agreement by which each was to contribute one-half of the expenses sustained in carrying on the work, the profits of which were to be equally divided; but no debts to outside parties were to be contracted with-

¹ Newton Manf. Co. v. White, 42 Ga. 148. In Bellona Company's Case, 3 Bland's Ch. 442, the Chancellor said: "It is certainly within the constitutional scope of the powers of the general assembly to constitute a body politic of one, or of a plurality of individuals. But if corporate capacity be given to a plurality, and the stock of the company by the owning of which alone any individual can be considered as a corporator, is all purchased and held by one, it would seem that the body politic would be thereby virtually dissolved. And it would seem it might be considered as a fraudulent evasion of the law, for any one individual, who had purchased all the stock of such corporation, to attempt to claim the benefit of the irrepealable nature of such an act of incorporation by allowing a part of the stock to be held by one or more other persons, and so, under the disguise of being a body politic, to protect himself from personal responsibility for his debts, and also to prevent the legislature from altering the act of incorporation."

out the consent of both of the parties. It was held that the repudiation of the agreement by the refusal of W. B. to be any longer bound by its terms, did not effect a dissolution of the corporation.¹ On a petition, filed by a majority in number of the stockholders of the Franklin Telegraph Company under a statute authorizing the Supreme Court for reasonable cause to dissolve the corporation, it was proved that the Franklin Telegraph Company leased its line to the Atlantic and Pacific Company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to that company, in which a majority in interest of the stockholders of the Franklin Telegraph Company were also interested; but that since the filing of the petition the lease in question had been cancelled by a vote of the directors of each company. Although the only injury alleged as a ground for dissolution had ceased to exist by the abrogation of the lease, it was argued that as the majority in interest had shown a disposition to deal unfairly with the rights of the minority of the stockholders, they could not longer be trusted, and that, as the court would discharge trustees who had wilfully violated the duties of their trust, it should dissolve the corporation. It was, however, held that no reasonable cause, such as the statute required, for a decree to that effect had been presented. The court said: "Such a power is one of great delicacy, and must be exercised with extreme caution, as the dissolution of a corporation must affect seriously not only the property of the petitioners, and of those by whom such frauds may have been committed or from whom they are to be apprehended, but also of those stockholders who are not parties to the controversy as such, and are represented in it only through the corporation itself. No proceeding so radical as the destruction of the organization should be taken unless, after careful examination, the court were fully satisfied, whatever the disadvantages and

¹ *McKay v. Beard*, 20 S. C. 156.

losses attending such a step might be, that in no other way could the rights of all innocent stockholders be so well protected."¹

Neither the mere insolvency of a corporation, nor proceedings in insolvency, nor the appointment of a receiver of the corporate property, will work a dissolution of the corporate existence.² The charter of a trust company provided that in case of the dissolution of the company, the debts due from it incurred by deposits in favor of minors, insane persons, or married women, should have a preference. The inspector of finance applied to the court of chancery by petition setting forth he had ascertained and believed that the company was insolvent, and praying for an injunction against it and for the appointment of a receiver. Thereupon notice to show cause was issued and served, the company appeared, and, no objection being made, an injunction was granted restraining the company from transacting any business until further order. At the same time a receiver was appointed to take possession of the property, and to administer it subject to the order and direction of the court. There was no evidence as to the real financial condition of

¹ Matter of Franklin Telegraph Co., 119 Mass. 447.

² Taylor v. Columbian Ins. Co., 14 Allen, 353; Boston Glass Manf. Co. v. Langdon, 24 Pick. 49; Folger v. Columbian Ins. Co., 99 Mass. 276; Nat. Pahquioque Bank v. First Nat. Bank, 36 Conn. 325, aff'd 14 Wall. 383; Howe v. Deuel, 43 Barb. 504; Lea v. Am., etc., Canal Co., 3 Abb. Pr. N. S. 1; Huguenot Nat. Bank v. Studwell, 6 Daly, 13; N. Y. Marbled Iron Works v. Smith, 4 Duer, 362; Green v. Walkill Nat. Bank, 7 Hun, 63; Nimmons v. Tappan, 32 N. Y. Super. Ct. (2 Sweeny) 652; Kincaid v. Dwinelle, 59 N. Y. 548; City Ins. Co. v. Commercial Bank, 68 Ill. 348; Moseby v. Burrow, 52 Texas, 396; People v. Erie R.R. Co., 36 How. Pr. 129; Coburn v. Boston Papier Mâché Co., 10 Gray, 245; Valley Bank v. Ladies', etc., Soc., 28 Kansas, 423; Hollingshead v. Woodward, 35 Hun, 410; Bruffett v. Gt. Western R.R. Co., 25 Ill. 357; Holland v. Heyman, 60 Ga. 410; Bell v. Indianapolis, etc., R.R. Co., 53 Ind. 57; Nat. Bank v. Insurance Co., 104 U. S. 54. The fact that the property and most of the franchises of a railroad company are held in custody by a court of equity for the purpose of enforcing satisfaction of specific claims, does not work a dissolution of the corporation. The corporate existence continues, although dominion over the road and property may be suspended. Heath v. Missouri, etc., R.R. Co., 83 Mo. 617.

the company. For aught that the record disclosed, it might be insolvent only in the sense of not having been able to meet its obligations in the due course of business,—a mere temporary embarrassment,—and might in fact be solvent in the sense of having sufficient property to discharge all of its obligations on a final settlement and winding up of its affairs. It was held that the receivership could not be said to operate a virtual dissolution of the corporation, and that no class of creditors was entitled to a preference.¹ There is nothing in proceedings in insolvency against a corporation to prevent its continuing to accomplish the end and purpose of its existence unless the statute under which insolvency proceedings are instituted has so declared. Where a person proved his claim in proceedings in insolvency, and received a dividend, it was held that there was no reason why he might not avail himself of a judgment against the corporation for the unpaid balance. The court said: "The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all its debts; and then no impediment would exist, before a surrender pursuant to law or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming its business. Or, if its capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use the corporate powers."² The term insolvency may denote an insufficiency of the entire property of a person to pay his debts; or the inability of a party to pay his debts as they become due in the ordinary course of business. The national bankrupt act used the term in the latter sense as applied to traders and merchants who were said to be insolvent.³ In the Massachusetts insolvent acts the term is

¹ *Dewey v. St. Albans Trust Co.*, 56 Manf. Co., 10 Gray, 243. See *State v. Vt.* 476; 48 Am. Rep. 803. ² *Coburn v. Boston Papier Mâché* ³ *Toof v. Martin*, 13 Wall. 40.

Bank of Md., 6 Gill & Johns, 205.

construed to mean an inability to pay in the ordinary course, as persons carrying on trade usually do, and not an absolute inability to pay one's debts at some future time on the settlement and winding up of his affairs.¹ The phrase "insolvent circumstances," in the English bankrupt act, has a similar meaning. Mere insolvency of a corporation, using that term in its ordinary sense to denote generally an inability to pay its debts, does not impair its power to manage its concerns and deal with its property, any more than if it were a natural person.² The doctrine in New York is, that although if a corporation does or suffers to be done acts that destroy the end and object of its creation it is equivalent to a surrender of its corporate rights, yet that mere insolvency, though total, is not sufficient evidence of such surrender. In *Bradt v. Benedict*,³ SELDEN, J., in reviewing some of the New York decisions, said: "It appears from these cases, that in order to justify the inference that a corporation has surrendered its franchises, it is not sufficient that it has become utterly insolvent, nor even that every vestige of its property has been sold by a sheriff, but it must also have lost all power to continue or to resume its business." An action was brought by some of the stockholders of a corporation for its dissolution, the appointment of a receiver, and the winding up of its affairs, under a statute providing that when an incorporated company remained insolvent a year, it should be deemed to have surrendered its rights, privileges, and franchises, and to be dissolved. The court, in denying the relief sought, said: "There is no finding that the property of this company was not sufficient to pay all its debts. It was simply found that it was insolvent, and that may mean simply an inability to pay and discharge its obligations as they accrue in the ordinary course of its busi-

¹ *Thompson v. Thompson*, 4 *Cush.* *Shone v. Lucas*, 3 *D. & R.* 218; *Pondville Co. v. Clark*, 25 *Conn.* 97. 127, 134.

² *Bailey v. Shofield*, 1 *M. & S.* 338, 349; ³ 17 *N. Y.* 93.

ness. The plaintiff gave evidence tending to show that the property of the company was not equal in value to the amount of its debts; and the defendant gave evidence tending to show that there was property sufficient to pay all the debts and still leave the capital nearly or quite intact. What the precise truth was as to the value of the property, the referee did not determine, and hence we do not know."¹

A State insurance commissioner in a petition to the court represented that a certain corporation was insolvent, and its condition such as to render its further proceedings hazardous to the public and to policy-holders. He prayed for an injunction restraining the corporation from continuing its business, and for the appointment of receivers. The court made the injunction, previously issued as prayed for, perpetual, and appointed receivers, and it was adjudged and de-

¹ Denike v. N. Y., etc., Co., 80 N. Y. 599. A corporation having been created for manufacturing purposes, six years afterward all of its property was sold on execution, excepting some articles which had been pledged for corporate debts and which were subsequently applied to such payment. The complainants were creditors, and they sought satisfaction from the stockholders of the corporation, which was wholly insolvent and had suspended business. The statute provided that for all debts which should be due from such a corporation at the time of its dissolution the persons then composing the corporation should be individually responsible to the extent of their respective shares of stock. The complainants insisted that the corporation was dissolved, and that they were entitled to recover the amount of its indebtedness from the stockholders who were defendants in the suit. The latter, on the other hand, contended that the corporation was not dissolved, and that no suit could be maintained against them

as stockholders until the dissolution of the corporation had been first judicially declared. It was held that the corporation was dissolved so as to render the individual stockholders liable to creditors. Penniman v. Briggs, Hopk. Ch. 300, aff'd 8 Cowen, 387. "For some years prior to the filing of the information" (in State Bank v. States, 1 Blackf. 267), "the bank had been in a condition of absolute insolvency. Yet during this period it enjoyed the public confidence, was the depository of the funds of the Federal government, issued paper to a large amount, made dividends among the stockholders, and strenuously resisted any interference or inquiry on the part of the legislature as an infringement of its chartered rights. It was proved at the trial that the indebtedness of the bank amounted to \$373,000, and that it had at the same time \$31 in specie, and no other available funds." HARPER, Chancellor, in State v. Bank of South Carolina, 1 Spears S. C. 433.

creed that "the said corporation be, and the same is hereby dissolved." It was claimed that the corporation ceased to exist for any purpose, before the commencement of proceedings under the United States bankrupt act; that the bankrupt law did not authorize process in bankruptcy against defunct corporations or deceased individuals, or undertake to administer on their estates; that it acted only on the living, and had no dealings with the dead, unless they died after the decree in bankruptcy. It was held, however, that the corporation still existed for the purpose of being proceeded against in bankruptcy. The court said: "The phrase, 'dissolving a corporation,' is used sometimes as synonymous with the annulling of the charter or terminating the existence of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation without terminating its existence. This is paralysis, not necrosis,—a suspension of corporate action, not a cessation of corporate life. . . . A corporation may, for certain purposes, be considered so far dissolved as to be incapable of injury to the public, and yet as retaining all the vitality which may be essential for the protection of the rights of others. This doctrine has been applied in several cases in the State of New York in the construction of a statute of that State concerning manufacturing corporations, which provided that, for all debts due and owing by the company at the time of its dissolution, the persons composing such company should be individually responsible. Under this statute, where an insolvent corporation suffered its property to be sacrificed, the annual elections were omitted, and no act was done manifesting an intention to continue the corporate functions, the court, for the sake of the remedy against the individual members and in favor of creditors, presumed a virtual surrender of the corporate rights, and a dissolution of the corporation. Yet, in these cases, the courts of New

York did not decide that the companies had lost all their rights, or were defunct corporations; but only that, even if they had a right to reorganize themselves and were so far in being, the case had happened in which they were dissolved for the purposes of remedial action by their creditors. In the case of *Folger v. The Columbian Ins. Co.*,¹ is to be found perhaps the most perfect compendium of the law on this subject. In that case, the Supreme Court of New York had adjudged that the Columbian Insurance Company 'be and is hereby dissolved.' But the Supreme Court of Massachusetts did not hesitate to inquire whether the judgment thus obtained in New York and relied on in Massachusetts was rendered by a court having jurisdiction of the cause and the parties, and to decide that, to decree an absolute and final dissolution of a corporation at the suit of an individual, was no part of the general jurisdiction of a court of law or chancery, and could only be justified by express statute; and then, after examining the provisions of the statutes of New York upon which the proceedings were based, to say that, notwithstanding the Supreme Court of New York had adjudged the corporation dissolved, and Chancellor WALWORTH had decided that such proceedings had effected a virtual dissolution of the corporation, yet that it did not extinguish its franchise, terminate its legal existence, or render it incapable of being sued at law or in equity. . . . This doctrine in relation to the extinction of a corporation is not a novel one; for in 1628 it was adjudged, upon the authority of earlier cases, in the case of *Hayward v. Fulcker*,² that a dean and chapter were not dissolved by a surrender to the king of all their possessions, rights, liberties, privileges, and hereditaments, which they had in right of their incorporation."³

¹ 99 Mass. 267.

² Sir Wm. Jones, 166.

³ Matter of Independent Ins. Co., 1 business is made perpetual. Dane v. Holmes, 103. In Maine, under the Young, 61 Me. 160. statute of 1857, ch. 47, sec. 46, the charter of a bank expires when an injunction restraining it from transacting

§ 424. **Legislative control over public corporations.**—When an act of incorporation is a grant of political power, to be employed in the administration of government, or when the whole resources of the institution are public funds, the charter is completely within the control of the legislature. Such corporations are in no way the result of contract; while it is otherwise as to those through which the legislature seeks to accomplish some public purpose through the instrumentality of a second party, who is to advance money, labor, or property. Where a State bank is to be employed in the administration of the government, and its funds exclusively public, the control of the legislature over its charter necessarily embraces a like control over each of its provisions, and authorizes the legislature to take from the bank any power or capacity that has been conferred, whenever, in the exercise of its constitutional discretion, the public exigencies seem to require it.¹

The power to adopt from time to time regulations calculated to guard against the evils and mischiefs attendant upon the practice of medicine and surgery by ignorant and incompetent persons, is a part of the political power vested in the legislature; and where an act incorporating a board of medical examiners makes it their duty to grant licenses to practicing physicians who, upon examination, shall be found qualified, on their paying to the treasurer of the cor-

¹ *State v. Curran*, 7 Engl. Ark. 32. As the right of Virginia to legislate for that part of the District of Columbia which was ceded by her to the United States continued until the 27th of February, 1801, the act of that State incorporating the Bank of Alexandria was a public law. *Young v. Bank of Alexandria*, 4 Cranch, 384. Interference by the United States with a corporation on the ground that the government, as *parens patrize*, is a trustee invested with power to enforce the proper use of the property and franchises granted,

for the benefit of the public, falls under two heads: 1st, where municipal, charitable, religious, or eleemosynary corporations, public in their character, have abused their franchises, perverted the purposes of their organization, or misappropriated their funds; 2d, where private corporations, chartered for definite and limited purposes, have exceeded their powers, and are restrained or enjoined from the further violation of the limitation to which their powers are subject. *United States v. Union Pacific R.R. Co.*, 98 U. S. 569.

poration ten dollars, and imposes a fine on such as shall practice without a license, one-half of which fine is for the use of the faculty of the board, the corporation thereby acquires no vested inviolable right. These provisions are introduced not for the regulation or promotion of private purposes or interests, but for the attainment alone of a public end. The granting of licenses by the board is not a franchise, nor property, but a duty ; and the allowance to the faculty of the fees for licenses, and a portion of the fine for practicing without a license, is merely an incident of a public regulation. Hence, a subsequent act incorporating an university which provides that a diploma given to a graduate shall confer on him the right to practice without having obtained a license from the board, is not unconstitutional.¹

The legislature has the absolute control over municipal corporations to create, change, modify, or destroy them at pleasure.² It may leave the organization of a new county to a vote of the people, and in such a case an option is given to the inhabitants to organize or not ; or it may create a county and require the inhabitants in express terms to organize it ; and the neglect of the citizens to obey, will not defeat the law. The creation of a municipal corporation depends in no degree upon the assent or dissent of the

¹ Regents of University of Md. v. Williams, 9 Gill & Johns. 365.

² Marietta v. Fearing, 4 Ohio, 427; Paterson v. Society, etc., 24 N. J. (4 Zab.) 385; Matter of Clinton St., 2 Brewster Pa. 599; Underhill v. Trustees, etc., 17 Cal. 172; San Francisco v. Canavan, 42 Id. 541; Stilz v. Indianapolis, 55 Ind. 515; Girard v. Philadelphia, 7 Wall. 1; People v. Chicago, 51 Ill. 58; New Orleans v. Cazelar, 27 La. Ann. 156; North Yarmouth v. Skillings, 45 Me. 133; Barnes v. District of Columbia, 91 U. S. 540. Although the

charter of a municipal corporation may be vacated and annulled and the corporation be dissolved by an act of the legislature, yet the existing debts or obligations of the corporation are not thereby abrogated or lessened. Amy v. Selma, 77 Ala. 103. Private corporations cannot be compelled by law to receive anything but legal tender in payment of debts due them ; but the legislature has power to enact that taxes, collected by public corporations for public purposes, may be paid otherwise. Bush v. Shipman, 4 Scam. Ill. 186.

inhabitants of the particular locality, unless such a condition be contained in the law. Nor will a public corporation be dissolved although its whole body of magistracy is gone, and the day of election has passed, so that it can proceed no further by its own power; the corporation in such case simply remaining dormant.¹ Money appropriated to a county by the legislature for purposes of internal improvement is, until it has been actually expended by the county, subject to legislative control, and may be apportioned to another county formed in part from the county to which the appropriation was originally made.² By the charter of a town the legislature conferred upon it the sole power to grant licenses to sell vinous and spirituous liquors within the corporate limits, and to appropriate the money arising therefrom to city purposes. Under the rule that the charters of such corporations may be repealed, modified, or amended at the pleasure of the legislature so far as relates to the political rights and powers of the corporators, it was held that although the legislature might repeal the power of granting the licenses or prohibit its exercise, yet that an act could not continue the franchise and at the same time prevent its exercise, or divert the advantage to be derived from it to another purpose than the one pointed out by the charter, because that would invade the private interests of the corporation.³ A municipal corporation

¹ *People v. Wren*, 4 Scam. 269; *Berlin v. Gorham*, 34 N. H. 266. See *St. Louis v. Allen*, 13 Mo. 400.

² *County of Rockland v. County of Lawrence*, 12 Ill. 1. It is not in the power of the legislature to create a debt from one corporation to another without the consent express or implied of the party to be charged. Hence when a part of a county is set off to form a new county without anything being said in the act with reference to a disposition of the funds in the treas-

ury of the parent county, a subsequent legislature cannot by enactment compel a division of such funds. But an assent to such an arrangement by the representative body of the county to be charged, will be binding on the county. *Hampshire v. Franklin*, 16 Mass. 76.

³ *Aberdeen Female Academy v. Aberdeen*, 13 Smedes & Marsh, 645, citing and following *Bailey v. New York*, 3 Hill, 539. The act of Congress which enabled the inhabitants of the territory of Indiana to form themselves

may be enabled to acquire property by its own means and for its own purposes or for those of the corporators, in which case the legislature cannot, in the exercise of its power over the corporation, divert such property from the uses of those at whose expense and for whose benefit it was purchased. A city may contract with individuals or other corporations with respect to its peculiar interests; and, if abolished as a corporation, the State will not thereby become the beneficial owner of rights of property belonging to the city, which will remain subject to the uses for which the city lawfully acquired or appropriated it. Where a city donated property to an incorporated university, it was held that when the ownership of the city ceased, the property was no longer public in a local sense, the city being a donor the same as if a private individual had been the giver; that although the legislature had power to amend or repeal the charter of the city, it had no power thereby to affect the original relation of the city as a donor to the university.¹

A ferry franchise is partly public and partly private. So far as the accommodation of passengers is concerned, it is public, while so far as it requires capital and produces revenue, it is private. The State may legislate touching it so far as it is public. Thus laws may be passed to punish

into a State, provided that the section numbered sixteen in every township should be granted to the inhabitants of such township for the use of schools. It was held that although the legislature of Indiana, after it became a State, had power to change those Congressional townships at pleasure, yet it could not thereby divest the inhabitants of the Congressional townships of their exclusive right to the sixteenth section of land granted to them, or to its proceeds in case it was sold. *State v. Springfield*, 6 Ind. 83.

Louisville, 15 B. Mon. 642. See *Milner v. Pensacola*, 2 Woods, 632; *Gas Co. v. San Francisco*, 9 Cal. 453; *De Voss v. Richmond*, 18 Gratt. 338; *New Orleans, etc., R.R. Co. v. New Orleans*, 26 La. Ann. 478; *Park Commrs. v. Detroit*, 28 Mich. 228; *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *People v. Kerr*, 27 N. Y. 188; *Matter of Boston & Albany R.R. Co.*, 53 Id. 574; *Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa, 455; *Pa. R.R. Co. v. New York, etc., R.R. Co.*, 23 N. J. Eq. 157.

¹ *City of Louisville v. University of*

neglect or misconduct in conducting the ferry in order to secure the safety of passengers from danger and imposition. But the State cannot take away the ferry when it has been once unconditionally granted and vested in the corporation, nor deprive it of its legitimate rents and profits. The franchise may, however, be forfeited by nonuser or misuser judicially ascertained; and the government may, in the exercise of the sovereign power of eminent domain, resume the property for public use, on making a just compensation.¹

Statutes of a State cannot divest a church of property acquired by it by purchase or by ordination previous to the American Revolution.² The dissolution of the regal government no more destroyed the rights of churches to possess and enjoy property which belonged to them than it did the right of any other corporation or individual to its or his own property. If real estate be purchased or secured under a treaty, the extinguishment of the treaty no more affects such rights, than the repeal of a municipal law affects rights acquired under it.³

§ 425. Inviolability of charter of private corporation.—Although, as we have just seen, a municipal corporation being created for public purposes alone, is, under proper limitations, within legislative control, yet the charter of a private corporation is an executed contract between the government and the corporators which the legislature has no power to repeal, impair, or alter, against their consent.⁴ By

¹ Benson v. New York, 10 Barb. 223. See Trustees of Schools v. Tatman, 13 Ill. 27.

² Terrett v. Taylor, 9 Cranch, 43.

³ Society, etc., v. New Haven, 8 Wheat. 464.

⁴ Dartmouth College v. Woodward, 4 Wheat. 518; Bush v. Shipman, 4 Scammon (5 Ill.) 190; Bruffet v. Gt. Western R.R. Co., 25 Ill. 353; Bing-

hamton Bridge Co., 3 Wall. 51; Wilmington v. Reid, 13 Id. 264; Delaware R.R. Tax, 18 Id. 206; Erie & Northeast R.R. Co. v. Casey, 26 Pa. St. 287; Lothrop v. Stedman, 42 Conn. 583; Allen v. Buchanan, 9 Phila. 283; Stevens v. Rutland, etc., R.R. Co., 29 Vt. 545; Zabriskie v. Hackensack, etc., R.R. Co., 18 N. J. Eq. (3 C. E. Green) 178; Sinking Fund Cases, 99 U. S. 737;

the act of Maryland of 1812, it was stipulated by the State that the corporation of the Regents of the University should continue forever. And yet the act of 1825 professed to abolish the corporation, and declared that the several faculties should thereafter consist of the professors alone, which was a peremptory and unconditional dissolution of the corporation, made by its terms to take effect with or without its consent, and manifestly passed under the mistaken impression that no consent was necessary.¹ The charter of St. John's College provided that a specified sum of money should be annually and forever thereafter given and granted as a donation by the public to the use of the college. Twenty-one years afterward the legislature passed an act to discontinue the donation, and ordered that it should remain in the State treasury subject to its appropriation by the legislature for literary purposes. It was held that the gift constituted, under all the circumstances of the case, a contract on the part of the State that could not be legally disregarded, and that the subsequent act was therefore unconstitutional.² A corporation was indicted for a violation of a statute passed in 1856 requiring the corporation to make and forever maintain in or around its dam a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty. The company was incorporated in 1848. By an additional act in 1848 the corporation was authorized to increase its capital stock upon the express condition that the corporation should be liable for damages to the owners of fish-rights existing above its dam, incurred by the stopping or impeding the passage of fish up and down the Merrimac River by the

Greenwood v. Freight Co., 105 Id. 13; Williams, 9 Gill & Johns. 365. The New Orleans Gas Light Co. v. Louisiana Light, etc., Co., 115 Id. 650; 11 Fed. Rep. 277; Cent. L. J. of Feb. 26, 1886, Vol. 22, No. 9.

¹ St. John's College v. State, 15 Md. 330.

² Regents of University of Md. v.

dam, and an adequate and constitutional mode of assessing these damages was prescribed by the act. The act also provided that it should take effect whenever the stockholders at a legal meeting should accept the provisions of it, and file an authenticated copy of their vote of acceptance in the office of the secretary of state, which was done. Soon after the passage of the act the damages assessed, as provided, were paid by the corporation. The court said : "This was not a new provision requiring the better performance of a pre-existing duty. It was substituting a new species of indemnity to parties where none in any form existed before, either by an action of tort at common law or by a claim for damages under any statute. Under these circumstances, it appears to us, especially after it had been acceded to by the company, and after they paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract executed by one party and binding on the other. . . . The rule is that where under a power in a charter rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."¹ Where a resolution of the common council of a city authorizes the construction of a railroad over routes designated in the articles of association of a railroad company upon certain conditions which are accepted by the company, it constitutes a contract which the company is bound to fulfil, and which the common council cannot rescind without adequate cause. The company is invested with a right of property in the franchises of which it cannot be deprived without its consent or against its will, and the common council has no right to annul or impair the grant.²

¹ Com. v. Essex Co., 13 Gray, 239.

porations take property subject to all

² Brooklyn Cent. R.R. Co. v. Brook-

the incidents which the general laws
lyn City R.R. Co., 32 Barb. 358. Cor-
of the land attach to it. An injunc-

Two railroad companies cannot by consent of the legislature given subsequently to subscriptions to the stock consolidate without the consent of the shareholders. Although if the State consents to the consolidation the act of the companies in making it will not be void, yet it will effect so great a change in the companies it will discharge non-consenting stockholders.¹ Such consolidation will not necessarily dissolve the corporation, but only entitle stockholders who do not consent to withdraw. When the charter of a railroad company provides that should the company at any time desire an amendment of the charter it shall be lawful for the legislature to make it, the most reasonable construction of the act is that it contemplated amendments that will facilitate the building of the road, and not such as will in effect create a new company for a different undertaking.² Although the charter of a corporation provides that it shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law, the legislature has the right at all times to inquire into the doings of the corporation and the manner in which the privileges and franchises conferred

tion neither violates nor impairs the obligation of the charter contract on the part of the State, because the property enjoined is presumed to be held by the corporation in fraud of the rights of the State. The right of a State to cause by statute banking companies to be restrained from the use of their franchises, upon bill or information filed and before a dissolution, has been repeatedly sustained by the courts. *Commercial Bank v. State*, 4 Smedes & Marsh, 439. A provision in the charter of a bank for summary process, by which the claims of a bank may be enforced against its debtors, is not a right but a remedy, and, as such, subject to the will of the legislature. *Bank of Columbia v. Okely*, 4 Wheat. 235.

¹ *McCravy v. Junction R.R. Co.*, 9 Ind. 358.

² *Booe v. Junction R.R. Co.*, 10 Ind. 93. If a Masonic grand lodge makes changes in the working of the Order exceeding its powers, the subordinate lodges are not bound, unless they regularly and understandingly assent to the alteration. When the grand lodge takes action on such alterations, the subordinate lodges should be informed distinctly of what is proposed to be done, and have an opportunity to instruct their representatives in the matter, otherwise they will not be holden, though their proxies acting under ordinary powers assented. *Smith v. Smith*, 3 Dessaus, Ch. 557.

may have been used and employed, and to pass any laws which may be deemed more effectual to secure the rights of the corporation and to compel the performance of its duties and liabilities. The remedy in such case as to the mode, the time when, and the courts where it shall be enforced, is not in any way placed beyond legislative control, and it should be alike in substance for all persons and corporations under the same circumstances.¹ A remedial statute with reference to the construction of a railroad applies to railroad corporations which were chartered before its enactment, as well as to those of a subsequent date, unless the corporation had actually entered upon the construction of its road under pre-existing laws. The exercise of police power is always necessarily retained by the people in their sovereign capacity for the security of the public, and it cannot be taken from them by legislative enactment or chartered immunities.²

§ 426. Reservation by legislature of power to repeal or change charter.—If the power to repeal a charter be reserved, the exercise of the power is merely carrying out the contract according to its terms, and the State is exercising its rights, not forfeiting those of the corporation. The power to repeal is something reserved absolutely, so that the franchises of the corporation may be revoked whenever the legislature shall think proper. It is sometimes reserved conditionally, to be exercised only upon the happening of

¹ Gowen v. Penobscot R.R. Co., 44 Me. 140; Howard v. Kentucky, etc., Ins. Co., 13 B. Mon. 282. Provisions in a statute inconsistent with those of a subsequent one are ordinarily regarded as repealed without any repealing clause. But the simple introduction into a private statute, like that of a railroad charter, of a portion of the provisions which are found in a public and general statute previously enacted, cannot be treated as a repeal of other

provisions which are omitted. Neither will such provisions exonerate the company from duties, liabilities, and obligations imposed upon similar corporations by a general statute to which no reference is made in the charter, unless the provisions of the general statute are inconsistent with those of the charter. Pratt v. Atlantic, etc., R.R. Co., 42 Me. 579.

² Veazil v. Mayo, 45 Me. 560.

a certain event, in which case the charter is repealable when the event happens. If there is a reservation of the right to repeal a charter when certain conditions are violated, and the violation is committed, a repeal will not be breaking the bargain, but keeping it; not impairing, but enforcing the obligation of the contract. The most that can be said is, that the repeal is void if it comes before the event. If the corporators desire to contest the validity of the repealing act, they must at least prove that the event did not occur. Nor is the legislature estopped from exercising its power of repeal by the fact that a decree has been obtained against the corporation at the suit of the attorney-general for a violation of its charter. This power of the legislature, which is a part of the contract, cannot be taken away by rules of court. For the same offence the charter might have been forfeited on *quo warranto*; but the State is not obliged to submit to have the machinery of a court interposed between it and its rights.¹ A provision in a general statute that the charter of every corporation that shall thereafter be granted, shall be subject to alteration, suspension, or repeal, in the discretion of the legislature, is as operative upon all companies incorporated after its enactment, as if it were repeated in their respective charters, although there be no reference to it in a given case in the particular charter.²

¹ Erie R.R. Co. v. Casey, 26 Pa. St. 287; Hyatt v. Whipple, 37 Barb. 595; McLaren v. Pennington, 1 Paige Ch. 102. See Donworth v. Coolbaugh, 5 Clarke Iowa, 300. As the legislature may, in pursuance of a right reserved, alter or repeal the charter of a corporation without impairing the obligations of a contract, the same thing may be done by the people when they establish the fundamental law of the State. Matter of the Reciprocity Bank, 22 N. Y. 9; S. C. 29 Barb. 369.

² Suydam v. Moore, 8 Barb. 358; Roxbury v. Boston, etc., R.R. Co., 6

Cush. 424. The East Boston Ferry Company was incorporated in 1852. Some years afterward the legislature passed an act limiting the rate of toll that ferries should charge railroad companies the cars of which crossed a ferry. It was held that the act was constitutional by virtue of a statute in existence when the ferry company was chartered, reserving the right to amend, etc., and that the act fixed the rate of toll which the ferry company could exact for passengers crossing the ferry in the cars. Parker v. Metrop. R.R. Co., 109 Mass. 506.

Hence an act passed under such circumstances after the incorporation of a mutual insurance company declaring that in such companies the net profits should be taken to be the excess of a dividend over six per cent. annually, payable by the companies respectively to the holders of the guaranty capital stock actually paid in, is constitutional though the by-laws of a company provide that seven per cent. paid to the holders of the guaranty capital stock shall be taken and estimated exclusively as expenses, and not as profits.¹ Upon a bill in equity by one of the creditors of the Chelsea Bank against a part of the stockholders to recover from them individually the amount of two bank notes, it appeared that the charter of the bank expressly entitled it to all of the powers and privileges, and subjected it to all of the duties and liabilities specified in the 36th chapter of the revised statutes, which declared that the holders of stock in any bank when its charter expired should be liable individually for the payment and redemption of all bills issued by the bank and remaining unpaid in proportion to the stock respectively held by them at the time of the dissolution of the charter; and that each bank should be subject to all of the liabilities mentioned in the 44th chapter. The latter provided that all acts of incorporation passed after a certain date should be subject to amendment, alteration, or repeal at the pleasure of the legislature, but that no act of incorporation should be repealed except for some violation of its charter, or other default, when the charter contained an express clause limiting the duration of the same. The Chelsea Bank was incorporated in 1836 to continue until 1851. In 1837 an act was passed repealing the charter. It was held that chapters 36 and 44 constituted a part, and must govern the construction of the contract with the bank, as much so as if they had been recited *verbatim* in

¹ Mass. Genl. Hospital v. State, etc., Assoc. Co., 4 Gray, 227. See Bangor, etc., R.R. Co. v. Smith, 47 Me. 34.

its charter ; that the reservations in those chapters were not conditions repugnant to the grant, but only limitations of it ; that the legislature had power to repeal the charter, and the act of 1837 was valid and effectual for that purpose ; that the proceedings of the legislature inquiring into and ascertaining whether existing facts rendered its action expedient and necessary, were in no proper sense judicial acts ; that although the statute provided for the nominal existence of the corporation after its dissolution for the purpose of closing its concerns, yet from the time of the repeal of its charter, billholders and other creditors became entitled to all of the remedies against the officers and stockholders provided in the 36th chapter.¹ A general banking law under which a bank was organized, provided that no shareholder should be personally liable for any corporate debt unless the articles of association signed by him declared to the contrary. Another section of the law reserved the right at any time to alter or repeal it. It was held that the fact that the articles of association of a bank contained a clause that the shareholders should not be liable in their individual capacity for any contract, debt, or engagement of the bank, could not be regarded as a contract with the State in any legal sense, there being no authority, necessity, or propriety on the part of the bank for introducing such a provision in its articles ; that the articles were dependent upon and became a part of the law under which the bank was organized, and subject to alteration or repeal the same as any other part of the general system ; and hence that no contract of the bank was impaired by a change in the State constitution imposing personal liability on the stockholders.²

A reservation of power to revoke charters of incorporations does not authorize the legislature to exercise its authority in this respect from whim or caprice, or without any cause, but only after examination upon grounds stated.³

¹ Crease v. Babcock, 23 Pick. 334.

² Sherman v. Smith, 1 Black. 587.

³ Delaware R.R. Co. v. Tharp, 5

Harring. Del. 454.

A deprivation of power by a legislative repeal in the exercise of a right reserved, is different from the case of a corporate charter in which no right of repeal is reserved, and a forfeiture is claimed for misuser or nonuser. In Indiana the act of 1855, by which the act of 1852 was repealed, gave an option to banks which had been doing business under the latter act to continue such business upon complying with certain conditions. As a bank which failed to conform to the requirements of the act of 1855 had no power to do a general banking business in its corporate capacity after that act came into force, it was held not correct to say that the power of such a bank continued until a forfeiture was judicially declared.¹ An act incorporating a bank provided that if the corporation should fail to go into operation, or should abuse or misuse its privileges, the legislature should have power to annul the charter. It was held, that although the judicial tribunals might vacate the charter without any previous reservation of a right to repeal it, upon ascertaining, by a proper issue, that the privileges of the corporation had been abused or misused, yet that when the legislature had reserved the right to inquire into and find the facts, however legitimate it might have been for the bank to prove before the legislature that it had never abused or misused its privileges, yet it was forever estopped in a court of justice by a legislative decision, the investigation upon the result of which the legislature reserved the right of repeal, being a rightful subject of legislation in which the corporation had acquiesced by accepting the charter.²

¹ Wilson v. Tesson, 12 Ind. 285. A general or special statute directing a suit for forfeiture to be brought, is not necessary in order that the will of the State may be known as to whether or not a forfeiture shall be claimed; for whenever the State declares, by its legislature, that a particular act of misfeasance or nonfeasance

done by a corporation or its officers, shall constitute a forfeiture of the charter, the discretion of the State is exercised, and its will that the forfeiture shall be claimed expressed. State v. Southern Pacific R.R. Co., 24 Texas, 80.

² Miners' Bank v. United States, 1 Greene, Iowa, 553.

Every grant of a sovereign power is, in case of ambiguity, to be construed strictly against the grantee, and in favor of the government. The rights of the public are not, therefore, presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter. Where the constitution or a general statute provides that every act of incorporation passed under it shall, at all times, be subject to amendment or repeal, at the pleasure of the legislature, it reserves to the legislature authority to make any alteration in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure that object, or other public or private rights. Hence, if, in a charter to maintain a dam across a stream, no express authority is given to maintain the dam without a fishway, the terms and provisions of the charter do not preclude the inference that the legislature contemplated the construction of a dam with a suitable passage for fish, so as not unnecessarily to impair the public right in that regard; and if the corporation should not make a proper fishway, it might be compelled to do so by more specific legislation. And, though the charter provides that the corporation shall pay damages to the owners of fishing rights above the dam, which it does, this does not provide compensation for injuries caused by the construction and maintenance of the dam to fishing rights in the river below, and the legislature may require the corporation to construct a suitable fishway around its dam, if such a fishway is necessary to protect fishing rights which have not been compensated.¹

¹ Commissioners v. Holyoke, etc., Co., 104 Mass. 446. The Supreme Court of the United States, in affirming this decision, said: "A charter may be granted to build a dam across a river whose whole course is within the State grant-

ing the franchise, with a provision exempting the corporation from all obligation to construct a fishway for the free passage of fish; for the enterprise of erecting a dam to create power to operate mills, is so far public in its na-

Where the charters of railroad companies are subject by a general law to alteration, amendment, or repeal, and it has been enacted that certain specific changes, required for public safety and convenience, shall be made in railroad beds, and in their crossings and connections, it is a necessary consequence of the exercise of this authority by the legislature, that it shall prescribe by whom, in what manner, and under whose supervision the work shall be done, and in what proportion the companies affected shall defray the expense. Being ordered and done for the common benefit, it is reasonable and lawful that the several companies shall be required to contribute a fair and just proportion of the cost. In such case, no contract is violated, and no property taken for public use without compensation.¹ One of the most obvious reasons for reserving to the legislature the right to alter, amend, or repeal the charters of railroad corporations, is, to enable it to compel an unwilling corporation to perfect and extend its connections with other railroads, as the convenience of the public may from time to time require. In a case in Massachusetts the court said: "The Boston and Albany Railroad Company must, of necessity, have a passenger station in Worcester; and it is obviously important to the public that all the other railroads named shall be connected with it. At any rate, the legislature was the

ture that it is competent for the legislature to exercise the power of eminent domain to accomplish the purpose, if suitable provision is made to compensate the owners of the property, or rights condemned under that power. But it is doubtful whether the legislature of a State can make a contract with such a corporation, authorizing it to construct a dam across a river flowing through two or more States, which shall permanently exempt the grantees from all such obligation, and destroy forever the rights of fishery in the river

throughout its whole course, from its source to its confluence with tide water. Damages, it is true, were to be paid to the owners of fish rights above the dam, and the court here, in respect to that matter, concurs with the State court that the meaning is satisfied by regarding it as providing for a partial interruption and injury of those rights, and not as contemplating their utter destruction." *Holyoke Co. v. Lyman*, 15 Wall. 500.

¹ *Fitchburg R.R. Co. v. Grand Junction R.R. Co.*, 4 Allen, 198.

exclusive judge as to that matter, and an amendment of the several charters so as to secure such an object, was a reasonable exercise of its reserved right. The compensation for the outlay is in the tolls received from travelers and others.”¹ If a railroad company refuses to provide reasonable accommodation for the public in any locality on the line of its road, the legislature may alter and modify the discretionary power which the charter confers on the directors so as to make the duty imperative. Whether a proper ground for interference is presented in a particular case, is a matter for the consideration of the legislature, and its determination will be conclusive.² Grants beneficial to a corporation will be presumed to have been accepted by it.³ A general corporation law provided that “the legislature may at any time alter, amend, or repeal this act; but such alteration or amendment shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the act so altering or amending this act.” It was held that the foregoing restriction was inserted solely for the protection of corporations, and could not be properly construed as intended to prevent the legislature by general amendment from removing any restrictions, or releasing or diminishing any obligation or burden imposed upon corporations by the general act.⁴ The charter of a corporation may be made liable to repeal by an amendment accepted by the corporation, notwith-

¹ Worcester v. Norwich, etc., R.R. Co., 109 Mass. 103.

² Com. v. Eastern R.R. Co., 103 Mass. 254.

³ Bangor, etc., R.R. Co. v. Smith, 47 Me. 34.

⁴ People v. Grand Blanc, etc., P. R. Co., 10 Mich. 400. Upon the incorporation of a religious society, the charter required the assent of a majority of the pewholders to the validity of every pew tax, but the legislature reserved power

to alter, amend, or repeal the charter at pleasure. When, therefore, the legislature afterward restored to the society the untrammelled right to tax the pews according to the tenor of the deeds of the pewholders, it impaired no obligation of contract contained in either the deeds or charter, and derogated from no right or interest of the pewholders of a fixed or permanent character. Bailey v. Trustees of Meth. Epis. Church, 6 R. I. 491.

standing the charter was before irrepealable.¹ A remedy may be changed or wholly taken away by the legislature after the commencement of a suit. In Maine, by the statute of 1831, the legislature reserved the right in certain cases to declare the charters of banks forfeited. In 1841 an act repealed the charter of the Frankfort Bank, and provided for the appointment of receivers, previous to which an action against the bank was commenced and its property attached. It was held that the creditors of the bank could not object to the constitutionality of the act dissolving the corporation for causes which under the charter were sufficient for the purpose; that as the bank had ceased to exist excepting so far that the receivers could prosecute any suit pending in its name, there was no party whom the plaintiff could prosecute or take judgment against unless in a court of equity; and that the obligation of the contract between the plaintiff and the bank was not impaired by the repeal of its charter, but only the mode of obtaining indemnity changed.² The right reserved in a charter by the legislature to alter or repeal it, is a right to change it as between the original parties and such others only as have been permitted, by mutual consent, to share in its privileges and benefits; not to compel them to operate in conjunction with others. Hence, an act which increases the number of trustees of a corporation without the consent of the corporators, and names the persons to fill the positions, is void.

¹ Mobile, etc., R.R. Co. v. State, 29 Ala. 573.

² Read v. Frankfort Bank, 23 Me. 318. By the constitution in force when a bank charter was granted, the assent of two-thirds of the members elected to each branch of the legislature was made requisite to every bill creating, continuing, altering, or renewing any body politic or corporate. When under a subsequent constitution this provision was changed, it did not affect the

power of the legislature to alter or repeal a corporate charter; the existence of the power not depending in any degree upon the mere form or manner of its exercise. If it were otherwise, the same argument would apply if, by another change in the constitution, the legislature should be made to consist of only one house or branch instead of two. Matter of the Reciprocity Bank, 29 Barb. 369; 29 N. Y. 9; State v. Southern Pacific R.R. Co., 24 Texas, 80.

If in such a case the old trustees had been displaced, and new ones appointed in their stead, the change for every substantial practical effect would not have been more radical.¹ Although it is not necessary that there should be an exact conformity between the act creating and the one repealing a corporate charter so far as the name is concerned, yet there should be such a correspondence as to leave no doubt of the intention of the legislature. Where the charter named an institution as "The President, Directors, and Company of the Oakland County Bank," it was held that the charter was not repealed by an act repealing the charter of "The Bank of Oakland County."²

§ 427. Grounds of forfeiture of corporate franchises.—The right of a corporation to exist, and its authority in that capacity to conduct the particular business for which it is created, are granted subject to the condition that the privileges and franchises conferred upon it shall not be abused or so employed as to defeat the ends for which it is established, and that when so abused or misemployed they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition be expressed in the charter, it is necessarily implied in every grant of corporate existence.³ Constant and wilful violations of the fundamental conditions on which a charter has been granted entitle the State to repeal it. Abuses of this character are of such magnitude, and affect the public so injuriously, that, when wilfully persisted in, it becomes a duty of high obligation on the part of those in authority rigidly to enforce the forfeiture.⁴ In an action brought to dissolve a hospital society, it appeared from the charter that the particular

¹ Sage v. Dillard, 15 B. Mon. 340.

⁴ Com. v. Commercial Bank, 28 Pa.

² People v. Oakland County Bank, 1 Doug. Mich. 282. St. 383. See Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. 461.

³ Chicago Life Ins. Co. v. Needles, 113 U. S. 574, per HARLAN, J.

business and object of the association was to ameliorate the sufferings of invalid women, by furnishing gratuitous treatment and advice to outdoor patients, and by providing skilful medical and surgical treatment in the hospital, which should include every appliance and remedial agent that promised to promote and hasten recovery, upon such conditions as would render the benefits available to those for whom they were designed, regardless of the nationality or religious opinions of the applicant; and to train and educate respectable intelligent women theoretically and practically in all that pertained to the duties of a professional nurse. It was further proved that the defendant having received from the State, under a statute making appropriations to certain public charitable institutions, the sum of \$7,500, adopted a resolution that \$2,500 be appropriated to pay one Thompson for services rendered the society, and directed the treasurer to pay the same from any funds belonging to the society; that under the resolution \$2,500, being a part of the \$7,500 appropriated by the State, was paid to the person referred to in the resolution, although he rendered the society no service except to assist in inducing the legislature to grant the appropriation; that such payment was made under a collusive and corrupt agreement with the treasurer of the society, who was one of the trustees, that Thompson should be paid by the defendant whatever sum should be appropriated in excess of the sum of \$5,000; and that the \$2,500 were paid Thompson under the resolution, which was passed by the trustees in confirmation of the acts of the treasurer and Thompson, which were well known to each of the trustees at the time. It was held that the corporation had been guilty of such an abuse of its powers as to have forfeited its charter.¹ To constitute a forfeiture

¹ People v. Dispensary & Hospital Soc., 7 Lansing, 304. The court will render a decree compelling a corporation to restore property acquired by fraud, notwithstanding such restoration will cause a dissolution of the corporation. Matter of White Mts. R.R. Co., 50 N. H. 50.

there must have been wilful abuse or improper neglect; something more than accidental negligence, excess of power, or mere mistake in the mode of exercising an acknowledged power.¹ Though a single act of wilful nonfeasance may be a ground of forfeiture, this will not be so in respect to an act of nonfeasance not committed wilfully, and not producing or tending to produce mischievous consequences to any one, and not contrary to the particular requirements of the charter. A substantial performance of the conditions or duty is all that is required.

The grant to a corporation being made, as we have seen, on an implied pledge that the conditions of it shall be fulfilled, when the public is affected by the breach of a condition, it is a violation on the part of a corporation of its duty. The State is not required to prove an actual injury. It is a sufficient cause of forfeiture if the act be such as in the nature of things is calculated to produce injury.² It was objected to the constitutionality of an act incorporating an aqueduct company for the purpose of supplying a village with water, that there was not an express provision in the charter requiring the company to supply all families and persons who should apply for water, on reasonable terms; that the company might act capriciously and oppressively, and that by furnishing some houses and lots, and refusing a supply to others, it might thus give a value to some lots and deny it to others. To the foregoing, the court replied that this would be a plain abuse of the company's franchise; that by accepting the act of incorporation, it undertook to discharge all the public duties required by the charter.³ A turnpike corporation made a conveyance of a portion of its road to a town, and afterward ceased to keep that portion of the road in repair. The

¹ *State v. Merchants' Ins., etc., Co.*,
8 Humph. 235. See *Harris v. Miss.*
Valley, etc., R.R.Co., 51 Miss. 602; *Com.*
v. Franklin Ins. Co., 115 Mass. 278.

² *Commercial Bank v. State*, 6 Smedes & Marsh, 599.
³ *Lumbard v. Stearns*, 4 Cush. 60.

legislature had previously relieved the corporation from the maintenance of a part of the road originally laid out, and permitted the receipt of the usual tolls for the residue. But the corporation assumed to abandon the repair and maintenance of a further portion of the road, and, the more effectually to relieve itself, made the sale. It was held that as it was a wilful, deliberate act, putting it out of the power of the corporation to perform its duty in the future, and a continued purpose and plan to escape a plain duty, and to throw off the burden of furnishing the consideration for which the franchise was granted, the charter must be declared forfeited.¹

At common law, the failure to comply with a material condition of the charter, either express or implied, is a ground of forfeiture. Of this character is the failure of a bank to redeem its notes which it has put in circulation. When it fails to do this, it ceases to discharge the obligation imposed upon it by its creation, and to answer the ends for which it was instituted ; and unless there be some express exemption extended to it for such failure, the State may resume the grant.² The objects of a corporation as expressed in its charter were, the promotion of education and science, the conducting of experiments in agriculture, the testing of soils, and the cultivation of trees. It was authorized to locate a college for these purposes, and to purchase both personal and real property ; but not to hold at any one time more than five thousand acres of land. The corporation bought property, located its college, and did what was required by its charter ; but five years subsequent to its organization it sold and transferred all of its property, and ceased to maintain a college or to perform any of its duties. The college buildings with the grounds,

¹ State v. Pawtuxet Turnp. Corp., 8 Spears, 433 ; Planters' Bank of Miss. v. R. I. 182. State, 7 Smedes & Marsh, 163. See

² State v. Bank of South Carolina, 1 State v. Commercial Bank, 10 Ohio, 539.

the apparatus and the library, were transferred to the State, and the rest of the property to private individuals. The president and trustees afterward only held five meetings, and nearly fifteen years were allowed to elapse without their holding any. In an action by the attorney-general to obtain a dissolution of the corporate existence, it was not contended by him that the mere lapse of time, or the mere fact of the sale of the corporate property, or the mere failure of the corporation to elect officers, would *ipso facto* work a dissolution; but that the absolute abandonment by the corporation of all of its duties, and all of the objects for which it was created, during nearly nineteen years, should be deemed by the court sufficient grounds for declaring its dissolution. Judgment of dissolution with costs was rendered, notwithstanding the pendency of a suit by the corporation for the recovery of real estate conveyed to the State several years previous.¹ The ordinary business of an insurance company was to insure vessels, goods, and to take all marine and inland navigation risks, to lend money on bottomry and respondentia, and to make fire insurances. The board of directors of the company having resolved that the company should cease to take any risks after a specified day, and directed the executive officers to cancel all policies and liquidate all outstanding liabilities as speedily as possible, the resolution was carried into effect, and for more than a year prior to the presentation of a petition for the appointment of a receiver no new policy had been issued, nor any new risk taken, except in two or more instances in pursuance of an agreement of the company to that effect contained in open policies which were outstanding at the date of the resolution. Only six risks were outstanding during the year. The company had maintained the form of its corporate organization; but it

¹ State v. Pipher, 28 Kansas, 127. See Valley Bank, etc., v. Ladies' Cong. Sewing Soc., Ib. 423.

had employed no clerks or agent, paid no salaries or office rent, and its board of directors had not been convened since the passage of the resolution. It was held that the company had suspended its ordinary and lawful business for one year within the meaning of the statute providing that in such case it should be adjudged to be dissolved. The court said : "Under our system of creating corporations by special acts of legislation, ostensibly for the public benefit, the judgment of the legislature is exercised upon the necessity and propriety of the corporate grant at the time and place where it is sought, and one important element in such judgment is the extent of previous outstanding corporate franchises of the same class and character. It is obvious that no accurate knowledge on this subject would be attainable, and no judicious legislation could be expected, if corporations created by existing and former acts were at liberty to cease transacting business and again to resume it whenever they pleased. From these considerations, and the public objects and purposes of their creation, it follows that the charters of these corporations imply and require that they shall perform the business for which they are instituted ; and an entire omission to commence business, and a substantial suspension of the same after it is commenced, are alike violations of the provisions of their acts of incorporation."¹ The better opinion is that a destruction of bridges which by not being restored leaves a turnpike road impassable for any considerable length of time, presents such a state of non-repair as will work a forfeiture at common law.² It is not a sufficient answer to an allegation that the defendant, a turnpike company, failed to keep its bridges over the streams crossing its road in good order and repair, that the act incorporating the company and giving it power to erect bridges is permissive only, and not

¹ Matter of Jackson Marine Ins. Co.,
² People v. Hillsdale & Chatham
4 Sandf. Ch. 559. Turnp. Co., 23 Wend. 254.

mandatory. If the bridges are an essential part of the road, and the road would be impassable, it is a part of the defendant's duty, having erected them, to keep them in repair.¹ On a *scire facias* against a turnpike company to forfeit its charter for neglect to keep its road and bridges in repair, it is no defense that a charter having been granted to a railroad company to construct its line near to and parallel with the turnpike, the income derived from persons and property passing upon the latter has been insufficient to keep the turnpike in good order and repair. "It might have been very proper for the State when chartering the railroad to have provided for compensation for the prospective loss to the turnpike company, as has frequently been done in other States under similar circumstances; but this was a question resting entirely with the legislature of the State, and their action is conclusive on the subject. There is another answer to the defense in this case, even assuming that the charter of the turnpike company contained exclusive privileges that forbade the legislature of the State incorporating the railroad company. The remedy was not in neglecting to repair the road and at the same time collecting the tolls. It was in restraining by proper proceedings the railroad company from constructing its road. The breach of the contract on the part of the State furnished no excuse for the turnpike company in disregarding its part of it, which was a burden, to wit, the repairs, while at the same time insisting upon the observance of the part beneficial, to wit, the collection of the tolls."² If an act incorporating a bank authorizes its location in a particular county, the establishment of an agency in another locality at which the banking business is carried on, is a violation of the charter.³ When

¹ Washington, etc., Turnp. Co. v. Maryland, 19 Md. 239.

* People v. Oakland County Bank, 1 Doug. Mich. 282. In New York it is

² Turnpike Co. v. State, 3 Wall. 210, per NELSON, J.

provided by statute that if any corporation does not organize and commence

a statute makes it the duty of a corporation to keep its principal place of business within the State to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts, a neglect of this duty and an abuse and misuser of the corporate powers, privileges, and franchises in these respects will be a ground for judgment of forfeiture of the charter.¹ The charter of a company, formed for the object of purchasing and making a profit of land and of working mines, provided that £100,000 of the capital should be subscribed, and half of that sum be paid in within twelve months, and that the corporation should not begin business until it had been certified to the board of trade by three directors that the required capital had been subscribed and £50,000 paid. The company commenced business without the payment of the £50,000, but three of the directors sent to the board of trade a certificate falsely stating that such payment had been made. It was held that the sending of the certificate and commencing business without the prescribed capital rendered the charter liable to forfeiture.² Where a statute requires the cashier of a bank to make, verify, and transmit to the auditor of the State an account of its condition, the neglect and refusal of the bank to do so or cause it to be done will be a ground of forfeiture of the corporate franchises.³

The safe investment of the surplus capital and other funds of an insurance company which are not needed to pay losses or to loan upon securities, the settlement and adjustment of losses, the collection or payment of debts due to or by the company, and the conversion of the corporate property, securities, and effects into money when

the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease.

N. Y. Rev. Sts., 7th Ed., p. 1531, sec. 7.

¹ State v. Milwaukee, etc., R.R. Co., 45 Wis. 579.

² Eastern Archipelago Co. v. Reg., 23 L. J. N. S. Q. B. 82; 22 Eng. L. & Eq. 328.

³ State v. Seneca County Bank, 5

necessary for the corporate purposes, are merely incidental to the ordinary business of the company for the transaction of which it is incorporated. The exercise of some of those incidental powers by the officers of the corporation during the time when the corporate business remains suspended will not prevent a dissolution of the corporation upon a proper application for that purpose.¹ It was alleged in a complaint against a railroad company and admitted by the answer that the corporation became insolvent thirteen years previous; that it had surrendered its property to creditors; that it had remained insolvent ever since; had not paid its debts, and had entirely suspended its business; and that another corporation with the same general object had, under the authority of the State, organized and was in operation in its stead. It was held that a judgment declaring the corporation dissolved, appointing a receiver, and making an injunction against it perpetual was proper.² In Connecticut a statute provided that the Superior Court, as a court of equity, might, on the application of any stockholder in any corporation organized under the laws of the State, wind up the affairs of the corporation and dissolve it whenever it should appear to the court that the corporation had voted to wind up its affairs or had abandoned the business for which it was organized, and had neglected for an unreasonable time to wind up its affairs and distribute its effects among its stockholders. The Superior Court having found that a corporation was liable to dissolution on the latter grounds, it was held not a defense that a decree in bankruptcy had been rendered against the corporation by the District Court of the United States in Massachusetts; nor that the corporation existed not only by the laws of Connecticut, but also by those of Massachusetts, Rhode Island, and New York; nor that the acts and omissions

¹ Ward v. Sea Ins. Co., 7 Paige Ch. 294.

² People v. Northern R.R. Co., 53 Barb. 98.

charged as abandonment of the corporate business were involuntary and forced upon the corporation by legal proceedings.¹

§ 428. When a judgment of forfeiture will not be rendered.—Although a general assignment by a corporation is not of itself either a dissolution of the corporation, or a surrender of its franchises, yet it may deprive it of the power to comply with the terms, fulfil the purposes, and perform the conditions upon which its charter was granted, and thus prove a ground of forfeiture for nonuser. A reasonable discretion must of necessity be allowed a corporation in the exercise of the powers on which its very nature depends, and each case must therefore rest somewhat on its own circumstances.² The right to improve and extend the navigation of a river is a franchise, the manner of doing it being the mode of exercising the franchise. If there are various alternative modes authorized by the charter, subject, each of them, to be changed at the will of the corporation, no experimental trial of one of the modes will work a forfeiture of the right to resort to the others. So long as the charter remains in force, the very employment of some one of the authorized modes of improvement is a practical exercise of the franchise.³ On an information against a rail-

¹ *Hartford v. Boston, Hartford & Erie R.R. Co.*, 40 Conn. 524. In New York the act of 1825, Session Laws, p. 450, sec. 6, provided that whenever any incorporated company should for one year have suspended its ordinary business, the corporation should be deemed to have surrendered its rights, privileges, and franchises, and to be dissolved; that is to say, an information might be filed and pursued to judgment of dissolution, not that the corporation would be deemed at an end without such a proceeding.

² *State v. Commercial Bank*, 13 Smedes & Marsh, 569.

³ *Chesapeake, etc., Canal Co. v. Balt., etc., R.R. Co.*, 4 Gill & Johns. 1. A petition for the dissolution of a corporation stated that one-half of the shares of the corporate stock was owned by the petitioners; that the parties differed concerning the management of the corporate affairs; and that the petitioners were convinced that if the methods and plans advocated by the other parties in relation to the management of the corporation were carried out, the result would be its financial ruin. What the methods and plans were the petition did not state; neither was it shown that, on account of disagree-

road company praying that the company might be compelled to show cause why its rights, privileges, franchises, and liberties should not be adjudged to be forfeited by reason of its neglect and refusal to run passenger trains on a branch road, it appeared that the company had built and maintained in good condition that portion of its road ; that it had been used for the transportation of freight, so as to meet the public wants and demands ; that the company had been ready to carry any passengers for a reasonable compensation, and that none had applied who had not been transported ; that there was not sufficient business to pay the expenses of running regular passenger trains ; that the want of passenger business had been caused by the establishing, under the authority of the legislature, of a competing line for the transportation of passengers over a horse railroad ; and that, for these reasons, the company discontinued the running of regular trains over the branch road, and gave public notice of this discontinuance. It was held that as the running of regular trains over the branch road had been fairly tried and proved disastrous, the company had discharged its duty, and the information must be dismissed. The court said : "Upon a line of railroad of much travel, and where the public convenience required frequent trains for the carriage of goods, a corporation would not discharge its duty by furnishing trains wholly inadequate to meet the public wants ; much less if it wholly neglected or failed to make any provision whatever to meet the public wants. We are not prepared to say that such neglect and failure would not be deemed such a dereliction of legal duty on the part of the corporation as to involve the loss of its franchises. But it is plain that the power to judge of what is necessary or reasonable in the premises, is, except

ment, or for any other reason, a dissolution of the corporation would be beneficial to the interests of the corporation. It was held that the petition was insufficient. Matter of Pyrolusite Manganese Co., 29 Hun, 429.

where the legislature has expressly intervened, in the first instance in the corporation. It is clear also that the duty required is not more than to meet and supply the public wants. These are measured by the business actually done, or what could be clearly shown would be done if increased facilities were granted. There is nothing in the language of the statute requiring, nor can any just implication from the powers and privileges conferred upon the corporation require, that trains for passengers or freight should be provided which are not wanted, or which the business upon the road would utterly fail to support. Yet such is in substance the claim made by the commonwealth through the attorney-general. It is contended that the duty is not relative, but absolute; that it is not to be measured by the public wants and exigencies at the time, but is to be performed at all hazards, or at any sacrifice, unless or until the legislature shall interpose to relieve the corporation from its performance. This position cannot be sustained."¹

Under a statute assuming that if a certain distance of a plank road is completed, it will be, as far as it goes, a public benefit, and may be used by the company for tolls, making it liable to forfeit for the non-completion of only so much as remains incomplete, a total failure can only be claimed for a neglect to complete the smallest distance allowed as a toll road, and a partial forfeiture for non-completion must be confined to the parts unfinished for a sufficient length. When, however, the act points out what is essential to com-

¹ Com. v. Fitchburg R.R. Co., 12 Gray, 180. "The railroad contemplated in the earliest legislation on the subject in Massachusetts, was but an iron turnpike, the use of which was to be paid for by tolls collected of persons traveling upon it. It apparently was not anticipated that railroad companies were to become themselves the carriers of goods and passengers. But

this idea or policy as to the mode in which railroads were to be used was abandoned before any of the railroads were constructed and put into operation." Ibid., per THOMAS, J., referring to Sts. of Mass. of 1829, chs. 26, 93; of 1830, ch. 4; of 1831, ch. 56; Boston & Lowell R.R. Co. v. Salem & Lowell R.R. Co., 2 Gray, 28.

pleteness, no part of the road can be deemed completed which has not been laid out and constructed as the statute directs. A plank road company was bound by the act incorporating it to complete five consecutive miles of its road before it was entitled to exact toll. Upon the fulfilment, however, of this condition, the right to toll on the part finished became vested, and could not be forfeited or affected by a failure of the company to construct the balance, or any other portion of the road. By one section of the act the company was to cease to be a body politic if within two years it had not commenced making its road, and expended on it ten per cent. of the capital stock. By another section, if the road was not finished in ten years, the company was to forfeit all right to so much of it as was not completed in a continuous line. It was held that to establish a forfeiture of the franchise of the entire road it must be shown that no five consecutive miles of it had been constructed, and that if it was sought to forfeit a part of the franchise, it must be made to appear specifically what part was not made in accordance with the charter. Neither could the franchise of five miles of completed road be forfeited on account of the balance of the road not being kept in repair, if there was no complaint in this respect as to the five miles. An act passed subsequently to the incorporation of the company providing that the road should be kept in more perfect condition than was required by the original act, and imposing a forfeiture of the whole franchise for a violation of the new provision, was held unconstitutional.¹

It is not a ground for the forfeiture of the charter of a bridge company, that the company did not demand and collect from every passenger the full tolls fixed by the charter, but made a regulation by which passengers paid by the year a much less sum than their tolls would amount to if they paid by the trip, in consequence of which the surplus fund,

¹ People v. Jackson, etc., P. R. Co., 9 Mich. 285.

by which the bridge was to be made free, was not properly increased, and the enfranchisement of the bridge was postponed; nor that the company refused to allow the relator to pass at the commuted rates of toll, the penalty being by fine for taking more toll than the law allowed, and not by forfeiture of the charter; nor that the company had not rendered to the legislature the periodical accounts required by its charter, the State during the time complained of owning about one-half of the stock, and being therefore itself a party to the omission; nor that when the company was about to build, and wanted a piece of ground for an abutment, it did not obtain the land in the mode prescribed by the charter, but made a bargain for it with the owner that, as the consideration, he and his family should pass toll free for forty years; nor that the company borrowed money to complete the bridge, the stock not being sufficient for that purpose and the charter not forbidding it.¹

§ 429. Waiver of forfeiture.—If the legislature with a distinct knowledge of a breach of duty by a corporation thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully existing notwithstanding the known default, such conduct will be taken to be intended as a declaration that the forfeiture is not insisted on, but that previous defaults are

¹ Com. v. Allegheny Bridge Co., 20 Pa. St. 185. In Com. v. Breed, 4 Pick. 460, the question was whether the charter of a drawbridge company had been forfeited. The act required that the draw should be attended by proper persons at the expense of the proprietors, and a penalty was provided for any delay that might be caused by a failure to raise it. No person was kept at the draw, but, by a general understanding with the coasters that it would be more convenient for them, the key or crank was left there, so the crew of

each vessel could open the draw. The court said that any delay would subject the company to a penalty, but would not be cause of forfeiture. Courts proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, which will be visited only for a plain abuse of power by which the corporation fails to fulfil the design and purpose of its organization. State v. Commercial Bank, 10 Ohio, 535; Com. v. Commercial Bank, 28 Pa. St. 383; Harris v. Miss. Valley, etc., R.R. Co., 51 Miss. 602.

waived.¹ The legislature by a public act recognized the existence of a corporation, supplied trustees in the places of such as had died or absented themselves, and authorized the corporation to continue. It was held that this act was a waiver of all previous forfeitures, and that as the then existing members acquiesced, their assent cured all irregularities.² The Chesapeake and Ohio Canal Company was incorporated by concurrent acts of Congress, and of the legislatures of the States of Maryland, Pennsylvania, and Virginia. It also succeeded by purchase and assignment to all of the rights and privileges of the Potomac Company, which had been incorporated long prior to the incorporation of the assignee company. The Baltimore and Ohio Railroad Company was chartered subsequent to the incorporation of the Chesapeake and Ohio Canal Company, but previous to the full surrender to the latter company by the Potomac

¹ Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. 456; State v. Bank of Charleston, 2 McMullan, 441; Enfield Bridge Co. v. Conn. River Co., 7 Conn. 28; People v. Phoenix Bank, 24 Wend. 431; Com. Bank of Natchez v. State, 6 Smedes & Marsh, Miss. 599; Balt. & Ohio R.R. Co. v. Marshall Co., 3 West Va. 319; Ormsby v. Vt. Copper Mining Co., 65 Barb. 360; Com. v. Union Ins. Co., 5 Mass. 230; Folger v. Columbian Ins. Co., 99 Id. 267, 274; Rice v. Nat. Bank, 126 Id. 300; Briggs v. Cape Cod Ship Canal Co., 137 Id. 71; Boston Glass Manf. Co. v. Langdon, 24 Pick. 49; Heard v. Talbot, 7 Gray, 113; Matter of N. Y. Elevated R.R. Co., 70 N. Y. 338; State v. Godwinsville, etc., Road Co., 44 N. J. 496; Basshor v. Dressel, 34 Md. 503; *In re Mechanics' Society*, 31 La. Ann. 627; Central, etc., R. Co. v. People, 5 Colorado, 39; Kanawha Coal Co. v. Kanawha, etc., Coal Co., 7 Blatchf. 391; Cent. Cross-town R.R. Co. v. Twenty-third St. R.R.

Co., 54 How. Pr. 186; People v. Ottawa Hydraulic Co., 115 Ill. 281. Persons in possession of corporate franchises will be considered as rightfully corporators against every one but the sovereign; that is, when it is shown that a charter has been granted, those in possession and actually in the exercise of corporate rights will be deemed rightfully there against all who have treated or acted with them in their corporate character. So, when it is shown that a charter has been granted upon a precedent condition, and persons are found in the quiet possession and exercise of corporate rights, the precedent condition will be taken as performed as against all but the sovereign; especially when the charter leaves it to others to declare the fact of performance, and they make the declaration. Tar River Nav. Co. v. Neal, 3 Hawks N. C. 520.

² State v. Vincennes University, 5 Ind. 77.

Company of its rights and interests. The charter of the Potomac Company was an act creating a corporation to open and extend the navigation of the river Potomac. The preamble stated that the extension of the navigation of that river from tide water to the highest place practicable on the north branch would be of great public utility, and that it might be necessary to cut canals and construct locks and other works on both sides of the river. The 4th section of the act authorized the president and directors to agree with any person or persons on behalf of the company to cut such canals and to do such other things as they should judge necessary for opening, improving, and extending the navigation of the river, and to prosecute the work from place to place and from time to time, upon such terms and in such manner as they should see fit. It appeared that there were in the valley of the Potomac on the Maryland shore between forty and fifty miles of narrow difficult passes, along which the canal, if made without reference to a railroad, would have to be supported by an embankment constructed in the bed of the river many feet below the usual low-water mark, and that if the railroad had a choice of location, a canal there would be impracticable. The railroad company filed a bill for an injunction prohibiting the canal and Potomac companies from making any contract with or receiving any conveyance from any of the parties to the agreement before made by them with the agent of the railroad company for any lands or any interest in lands owned by them and lying within the limits of the actual location of the railroad as surveyed and marked out by its engineers. It was held that the Potomac Company had an unlimited discretion coextensive with the geographical limits of its charter to make a canal from place to place for opening, improving, and extending the navigation of the river; that its charter being a contract between the company and the States of Maryland and Virginia, the obligation of which could not without its

consent be impaired by any act of the legislature of either of the States, nor by the concurrent acts of both, consistently with the Constitution of the United States, the charter of the railroad could not take away or diminish the prior and paramount right of the Potomac Company to select and appropriate any lands in the valley of the Potomac for the site of a canal wherever it should think proper. There being no difference in principle between a law that in terms impairs the obligation of a contract, and one that produces the same result in the construction and practical execution of it; that the canal company as the assignee of the Potomac Company occupied its place, and was invested with the same prior and paramount right that was originally granted and vested in the Potomac Company; that the charter of the Potomac Company was not limited in its duration, but expressly made perpetual by its terms, defeasible only on failure by the corporation to accomplish within the time limited what was required to be done; that if the States that granted it had chosen to take advantage of the non-performance of the condition, the charter might have been avoided or forfeited by *scire facias* or *quo warranto*, but that not having done so, the franchise endured notwithstanding the breach of the condition; that the two States upon whose pleasure alone the continuance of the corporation depended, by the act to incorporate the canal company conclusively remitted to the Potomac Company any abuse or neglect of its franchises, and treated the latter as a subsisting corporation in the possession of all of its original powers, by requiring its assent to the charter of the canal company, and by declaring that upon the surrender and transfer by the Potomac Company to the canal company of its charter, all the rights and powers therein granted to the Potomac Company should be vested in the canal company,—not the rights and powers then held by the Potomac Company,—but all that had been granted, and which must have

been considered as then subsisting.¹ Where the charter of a bank provided that unless a certain sum therein named was paid in within two years, the act of incorporation should be void, it was held that it would be unreasonable and unjust seven years after granting the charter to oust the corporation from its franchises for this reason, even if there was evidence of the non-payment of the sum pursuant to the requirement.² The charter of a turnpike company made it the duty of the corporation to lay before the legislature; at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road, under the penalty of forfeiting the privileges of the act. Toll-gates were erected on the road in 1806; but no account was laid before the legislature until 1830, and at the end of the several terms of six years terminating in 1836 and 1842, which accounts were accepted by the legislature as sufficient and satisfactory; and in 1833 the legislature passed an act authorizing the corporation to change the route of its road in certain places. It was held that the reception of the accounts, and the passage of the act of 1833, constituted a waiver of the pre-existing ground of forfeiture. The court said: "The legislature did not expressly declare that they recognized the corporation as in existence, or confirmed its privileges, but we think no other construction can be given to their proceedings. It is a reasonable doctrine that a breach of condition may be waived. It is an important element in the law relating to landlord and tenant. There is as much reason for considering the acts of a legislative body a waiver of forfeiture, as there is for giving that effect to the act of a landlord. The State can claim no exemption from the ordinary rules which govern contracts, and there is not to be one law for them, and another for private persons. The legislature ac-

¹ Chesapeake & Ohio Canal Co. v. ² People v. Oakland County Bank, 1
Baltimore, etc., R.R. Co., 4 Gill & Doug. Mich. 282.
Johns. I.

cepted the accounts laid before them in 1830 and the subsequent years as sufficient and satisfactory; that is, they were satisfied with the accounts as a sufficient compliance with the charter. The act of 1833 is an equally clear waiver of a forfeiture. Notwithstanding what had occurred, they authorized the corporation to alter the route of their road. The act is susceptible of no other construction in this regard than that the legislature intended to waive any forfeiture consequent on the prior omissions of the corporation. If they had intended to insist on any forfeiture, the act certainly would not have been made. The act was intended to be beneficial to the corporation. But it would not have been so, unless they retained the other corporate powers necessary to enable them to carry into effect the purposes of the act.”¹

If by the terms of the charter the franchise is forfeited absolutely on failure to perform a condition, the doctrine of the waiver of a forfeiture by the legislature by subsequent legislative acts is inapplicable.²

§ 430. The fact of forfeiture cannot be tried collaterally.—It cannot be shown in defense to the action of a corporation that the plaintiff has forfeited its corporate rights by misuser or nonuser. Advantage can be taken of such forfeiture only on process in behalf of the State instituted directly against the corporation for the purpose of avoiding the charter or act of incorporation; and individuals cannot avail themselves of it in collateral suits until it is judicially declared.³ Although nonuser and abandonment of its

¹ State v. Fourth N. H. Turnpike Co., 15 N. H. 162. See People v. Fishkill P. R. Co., 27 Barb. 460; Central Crosstown R.R. Co. v. Twenty-third Street R.R. Co., 54 How. Pr. 168; Matter of N. Y. Elevated R.R. Co., 70 N. Y. 327; Matter of the Mechanics' Soc., 31 La. Ann. 627; White's Creek Turnp. Co. v. Davidson, 3 Tenn. Ch. 396; La

Grange, etc., R.R. Co. v. Rainey, 7 Coldwell Tenn. 420.

² State v. Fourth N. H. Turnpike Co., *supra*.

³ Thompson v. N. Y. & Harlem R.R. Co., 3 Sandf. Ch. 625; Central Crosstown R.R. Co. v. Twenty-third Street R.R. Co., *supra*; Matter of N. Y. Elevated R.R. Co., *supra*; N. J. South-

business by a corporation may be a gross disregard of the duty imposed on the corporate body by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of corporate rights and privileges, it does not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by its charter can be defeated or denied by third persons in collateral proceedings. "This results from the very nature of an act of incorporation. It is not a contract between the corporate body on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers on the other. It is a compact between the corporation and the government from which it derives its powers. Individuals, therefore, cannot take it upon themselves in the assertion of private rights to insist on breaches of the contract by the corporation as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would be a great anomaly to allow persons not parties to a contract to insist on its breach and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be ag-

ern R.R. Co. v. Long Branch Commissioners, 39 N. J. 28; Crump v. U. S. Mining Co., 7 Gratt. 352; Hamilton v. Annapolis R.R. Co., 1 Md. Ch. 107; Connecticut, etc., R.R. Co. v. Bailey, 24 Vt. 465; Irvine v. Lumberman Bank, 2 Watts & Serg. 204; Dyer v. Walker, 40 Pa. St. 157; West v. Carolina Ins. Co., 31 Ark. 476. It is probably true that a legal surrender may be presumed

when there has been for a sufficient length of time an entire nonuser of corporate franchises and a neglect to choose corporate officers. But it is upon the ground alone of a presumed surrender of the charter, that evidence of nonuser of corporate franchises can be received. Brandon Iron Co. v. Gleason, 24 Vt. 228.

grieved by their exercise. Therefore, it has often been held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."¹ In an action by a canal corporation against an individual to recover tolls the defendant cannot introduce evidence to show that he has sustained damage in his business from the failure of the plaintiff to construct the canal in the manner required by the act of incorporation; it being a failure of duty by reason of which the defendant has suffered no injury peculiar to himself, but one which can only be redressed by a public prosecution. "If," said the court, "the canal was opened, and toll claimed, and the public did not interfere, and the defendant used the canal, he thereby subjected himself to the payment of the toll. By demanding the toll the plaintiff claims to have complied with the conditions and provisions of the act of incorporation; and the defendant, by using the canal, is estopped to deny the right of the corporation to the toll, although it might be proceeded against by *quo warranto* for the repeal and dissolution of the charter, or by indictment for a misdemeanor in not keeping the canal in repair."²

¹ Heard v. Talbot, 7 Gray, 113. See Rex v. Amery, 2 Term Rep. 515; Same v. Pasmore, 3 Id. 199; Terret v. Taylor, 9 Cranch, 43; Slee v. Bloom, 5 Johns. Ch. 366; S. C. 19 Johns. 456; Vernon Soc. v. Hill, 6 Cowen, 23; McLaren v. Pennington, 1 Paige Ch. 102; Chesapeake, etc., Canal Co. v. Balt., etc., R.R. Co., 4 Gill & Johns. 1.

² Proprs. of Quincy Canal v. Newcomb, 7 Metc. 276. In an action against the proprietors of a canal to recover damages sustained in consequence of the canal not being sufficient to pass a raft, the declaration averred a loss arising from the failure of the

defendants to dig their canal of the depth required by their act of incorporation, and also from its filling up and the want of deepening and cleansing. PARSONS, C. J., in delivering the opinion of the court on a motion in arrest of judgment, held the action maintainable, not on the ground that the plaintiff sustained damage by means of the original failure of the proprietors to make the canal of the required depth, but on account of their neglect of duty in not keeping it cleansed and free from obstructions after it had been made. The plaintiff proved not merely damage arising from the fact that the

When a company never had any corporate existence so as to enable it to take and hold property in a corporate name, that fact may be inquired into in a collateral proceeding. And so, if, professing such existence, it acquires for a particular purpose in a corporate name the property of another, as it has no power as such to take, neither can it transfer, and the sufficiency of a transfer made by it may be inquired into collaterally. Again, when a corporation as a legal and necessary consequence of certain acts has ceased to exist, and an individual claims that he has thereby been injured, or that certain benefits have resulted to him, he may, by averring these facts, have his remedy, and need not in the first instance commence a proceeding and have it declared that the existence of the corporation has terminated. If the original company has lost its identity by becoming merged in a new organization, it may be treated as at an end. It cannot thus relieve itself, or perhaps the corporators individually, from responsibility to those to whom it or they are indebted, but it may by the act of merger become so situated as to be estopped from claiming that it remains undissolved. Where, on the other hand, a corporation had an existence, and has committed no act which *per se* works a forfeiture or dissolution, and the inquiry is whether there have been such irregularities in its proceedings or such failure to comply with the terms of its charter or the law under which it was organized as to work a forfeiture, the courts of another State cannot determine the question either in a direct or collateral proceeding. A judgment of forfeiture must first be obtained in the State which conferred the corporate powers.¹

canal was not constructed of the required depth, but also that he entered it with a raft, and that, owing to the shallowness of the water, his raft grounded, and being detained there during a storm a part of his raft was

lost. *Riddle v. Proprs. of Locks and Canals*, 7 Mass. 169.

¹ *Carey v. Cincinnati, etc., R.R. Co.*, 5 Iowa, 357. A general statute of another State providing for the incorporation of companies may be proved

§ 431. Judicial determination of forfeiture.—Every corporation is, in legal contemplation, supposed to be created on account of the benefit which the public at large or some particular section or class of the community will derive from the exercise of its corporate powers, as well as for the individual benefit of the stockholders. As already stated, if an act of incorporation fixes a definite time in which the charter shall expire, when the time arrives, the corporation is dissolved.¹ But when the continuance of the corpora-

by the production of the printed volume of laws purporting to be published under the authority of the State government, which is *prima facie* evidence. Proof that the company attempted an organization under this statute, transacted business as a corporation *de facto*, and that the certificate of shares of stock in the company recite that the company was organized under the general laws of such other State, is sufficient, in the absence of anything to the contrary, to authorize a finding that the company was duly incorporated, in a case in which the fact is only collaterally in issue. *Barrett v. Mead*, 10 Allen, 337.

¹ Although a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate franchises by the judgment of the court in an action instituted for that purpose by the attorney-general, yet the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty, or violations of its charter, or default as to limitations imposed. When the language used shows that the legislature intended to make the continued existence of the corporation

depend upon its compliance with a particular provision of the act, in case of non-compliance its rights are to be deemed forfeited and terminated, whether the corporation is organized under a general or special law. *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524. Where an act incorporating a railroad company provides that the company shall begin the construction of its road and expend thereon ten per cent. of its capital within a specified time after its articles of association are filed in the office of the secretary of state, and finish its road within a time named, the existence of the corporation is determined by the omission to comply with either of the prescribed conditions. In such case an action or judicial procedure is not necessary to declare or complete a forfeiture of the charter and loss of corporate powers. The statute executes itself, and the non-existence of the corporation may be alleged in opposition to an application by it to appropriate land under the law authorizing the taking of private property for public use. *Matter of Brooklyn, etc., R.R. Co.*, 72 Id. 245. In such case the leasing by the company of a portion of its road to another company with the right to lay rails thereon, the tracks when constructed to be operated and maintained by the lessee for its exclusive use and benefit, is not a user by the lessor of its fran-

tion beyond a fixed time is made to depend upon the performance of a given condition, the non-performance of the condition is a mere ground of forfeiture which can be taken advantage of only by the State, although it be provided that upon failure to comply with the condition the corporation shall be dissolved. In such case a corporation is entitled to a trial in due course of law before its charter can be taken away. It has been truly said that "a franchise is a valuable privilege and is property in contemplation of law, and the body possessing it is as much entitled to a judicial determination of its right or want of right to hold it as a natural person is of his right to his lands or goods."¹ To effect a dissolution, therefore, for an alleged cause of forfeiture, there must be a judgment of a court of competent jurisdiction declaring the corporation dissolved.² An act declaring a forfeiture, if beyond legis-

chise within the meaning of the charter. *Id.* 81, 69. In New York, under the act providing that for all debts due and owing by a manufacturing corporation at the time of its dissolution the persons then composing it should be individually responsible to the extent of their respective shares of stock, it was held that the dissolution, in order to subject the shareholders, might be shown short of judicial proceedings for that purpose; that the corporation having ceased to act, and being without funds and indebted, it was to be deemed dissolved so far as to give the remedy to creditors; and that such a dissolution *sub modo* being proved, the liability of the stockholders, as declared by the act, became absolute. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473. In an action against stockholders, the petition alleged the organization of the corporation under the laws of the State, that at a time mentioned the corporation became wholly insolvent and bankrupt, that it presented its

petition to the United States District Court, and was in that month declared a bankrupt, and that it was totally without funds and means to exercise its corporate powers. The answer admitted the total want of funds and means and absolute destitution of assets, but denied the legal inference that the corporation was thereby dissolved within the meaning of the statute. It was held that there had been such a dissolution as afforded creditors a remedy against the individual shareholders. *State Savings Assoc. v. Kellogg*, 52 Mo. 583.

¹ *AGNEW*, J., in *Allen v. Buchanan*, 9 Phila. 283. See *Baltimore v. Pittsburgh, etc., R.R. Co.*, 1 Abb. U. S. 9.

² *Matter of Long Island R.R. Co.*, 19 Wend. 37; *Ward v. Sea Ins. Co.*, 7 Paige Ch. 294; *Barclay v. Talman*, 4 Edw. Ch. 123; *Kincaid v. Dwinnelle*, 59 N. Y. 548; *Sturges v. Vanderbilt*, 73 Id. 384; *Hollingshead v. Woodworth*, 35 Hun, 410; *Cosenback v. Salt Springs Nat. Bank*, 53 Barb. 506; *Master Stevedores Assoc. v. Walsh*, 2

lative authority, cannot be strengthened by reciting facts which might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment; but the question of forfeiture upon condition broken is strictly judicial, and the legislature cannot constitutionally know either that the facts exist, or their legal effect.¹ A charter provided that it might be altered or repealed if it should be made to appear to the legislature that there had been a violation of

Daly, 14; *Cartan v. Father Mathew*, etc., Soc., 3 Id. 20; *Northeast R.R. Co. v. Casey*, 26 Pa. St. 301; *Com. v. Pittsburgh*, etc., R.R. Co., 58 Id. 46; *La Grange & Memphis R.R. Co. v. Rainey*, 7 Coldw. Tenn. 420; *Baker v. Backus*, 32 Ill. 79; *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *Williams v. Lowe*, 4 Nebraska, 382; *Kennebec*, etc., R.R. Co. v. *Kendall*, 31 Me. 470; *State v. Cent. Ohio Mut. Relief Assoc.*, 29 Ohio St. 399; *State v. New Orleans Gas Light Co.*, 2 Rob. La. 529; *Westcott v. Minnesota*, etc., Co., 23 Mich. 145; *State v. Vincennes University*, 5 Ind. 77; *Barren Creek Ditching Co. v. Beck*, 99 Id. 247; *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Conn. 28; *Spencer v. Champion*, 9 Id. 536; *Nat. Pahquioque Bank v. First Nat. Bank of Bethel*, 36 Conn. 325; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *Deitweiler v. Breckenkamp*, 83 Mo. 45. See *Perrin v. Granger*, 30 Vt. 595; *Pentz v. Citizens' Fire*, etc., Ins. Co., 35 Md. 73. When a railroad company obtains a franchise to construct its road through the streets of a city, upon the condition that the road shall be completed within a specified time, that condition is a condition subsequent, and nothing short of a judicial decision upon the question involved can deprive the company of the franchise, or impair

its rights of property in it. *Brooklyn Cent. R.R. Co. v. Brooklyn City R.R. Co.*, 32 Barb. 358.

¹ *State v. Adams*, 44 Mo. 570. Where a statute provides that if a corporation suspends its ordinary business for one whole year it shall be adjudged to be dissolved, the object of the law is not to put an immediate end to the corporation for all purposes at the termination of the time, so as to deprive its creditors of all rights and remedies by suit against the corporation; but to enable the creditors and all others who are interested in having the surrender of the corporate privileges, and a dissolution of the corporation judicially declared, to take the proper proceedings for that purpose. Until a judgment upon a *quo warranto*, or a decree of court, therefore, has declared a surrender of the corporate franchises, and the dissolution of the corporation, any creditor is at liberty to proceed by suit against the corporation in the same manner as if the alleged surrender by nonuser had not occurred, and a judgment against the corporation, and an execution and sale of the corporate property under it, before any such proceedings are instituted, will be valid. *Mickles v. Rochester City Bank*, 11 Paige Ch. 118.

some of its provisions. It was held that the determination whether a corporation had violated its charter was not within the province of the legislature, and hence that, in the absence of a judicial determination, an act which simply declared that the charter was repealed, was void.¹ A railroad company having been incorporated, the name of the company was subsequently changed by an act of the legislature to The Great Western Railroad Company. Afterward an act was passed incorporating "The Great Western Railroad Company of 1859," and conferring on it "all the privileges, powers, rights, and franchises, at any time before possessed by the Great Western Railroad Company." The court, in holding that an action brought against the Great Western Railroad Company of 1859, to recover damages for the breach of a contract on the part of the Great Western Railroad Company, previous to the incorporation of the former, could not be maintained, said that the forfeiture by a private corporation of its charter was a question for the courts, and not the legislature ; that the power of the legislatures of the several States resembled in this respect the prerogative of the king of Great Britain, who may create, but cannot dissolve, a corporation, or, without its consent, alter or amend its charter ; that, therefore, the act, so far as it was designed to declare a forfeiture of the Great Western Railroad Company, and to dissolve that body, was inoperative and void ; that if the old corporation had sold and transferred all of its property to the new one, the charter and franchises would still have remained, and could not have been sold unless authorized by the legislature ; that the sale of the rolling stock and personal property of the road would not produce a disorganization of the corporation, which might exist after its property was gone ; that if there was a cause of forfeiture, that must be determined judicially to make it effectual ; and that, as the old

¹ Flint, etc., P. R. Co. v. Woodhull, 25 Mich. 90.

company, so far as the record disclosed, was still in existence, it should have been sued, and not the new company.¹

§ 432. Equity jurisdiction.—A court of equity has no power at common law to dissolve a corporation and sell its property at the suit of an individual in his own behalf and name; though it may hold trustees of a corporation accountable for an abuse of trust, or grant equitable relief against a corporation at the suit of an individual when it would be done on similar grounds against a private person.² Nor can a corporation be enjoined at the suit of the attorney-general from the exercise of unlawful power, unless the acts are injurious to the public, and call for prompt suppression. The Supreme Court of Massachusetts, in a comparatively recent case, said: “The only cases in which informations in equity in the name of the attorney-general have been sustained by this court, are of two classes. The one is of public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation, and are there-

¹ *Bruffet v. Great Western R.R. Co.*, *25 Ill.* 353.

² *State v. Merchants' Ins. Co.*, *8 Humph. Tenn.* 235; *Bayless v. Orne*, *1 Freeman Miss. Ch.* 161; *Strong v. McCagg*, *55 Wis.* 624; *Bangs v. McIntosh*, *23 Barb.* 591; *Howe v. Deuel*, *43 Id.* 504; *Doyle v. Peerless Petroleum Co.*, *44 Id.* 239; *Belmont v. Erie R.R.* *Co.*, *52 Id.* 637; *Buffalo, etc., R.R. Co. v. Cary*, *26 N. Y.* 75; *Denike v. N. Y., etc., Lime Co.*, *80 Id.* 599; *Baker v. Administrator, etc.*, *32 Ill.* 79; *Neall v. Hill*, *16 Cal.* 145; *Gaylord v. Fort Wayne, etc., Co.*, *6 Bissell*, 286; *Atty. Genl. v. Tudor Ice Co.*, *104 Mass.* 239; *Atty. Genl. v. Clarendon*, *17 Ves. 491.*

fore against public policy, is not one of them."¹ In a suit brought in the New York court of chancery by the attorney-general, the court, in denying a motion made by him for an injunction to restrain the defendant from exercising the privilege of banking, without authority, said: "If a charge be of a criminal nature, or an offence against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law

¹ Atty. Genl. v. Tudor Ice Co., 104 Mass. 244. In Wisconsin, in Atty. Genl. v. Railroad Cos., 35 Wis. 425, the court said that there was an unbroken line of decisions of the most respectable authority, covering some half a century, most of them going on excess or abuse of corporate franchises, seeming to establish the jurisdiction of courts of equity in this country, as conclusively as it is established in England, of private suits to restrain private wrong arising from excess or abuse of power by corporations. "In such cases," said the court, "public wrong may be considered only as an aggregation of private wrongs. And the jurisdiction once established to enjoin private wrong in each case at the suit of the person wronged, it is almost a logical necessity to admit the other branch of the jurisdiction, to enjoin, at the suit of the State, such a wrong common to the whole public, as interests the State, and could be remedied by private persons by a vast multitude of suits, only burdensome to each, and impracticable for very number, more conveniently, effectually, and properly represented by the attorney-general as *parens patriæ*. But jurisdiction of informations of this nature has sometimes been denied here; courts of equity in this country, singularly enough, being sometimes

more timid to control corporate power, and less willing to protect the public against corporate abuses, than the English Chancery. In both branches of the jurisdiction, it proceeds as for *quasi* nuisance, and it is difficult to understand why the jurisdiction should be asserted as to private nuisance, and denied as to public nuisance; why, for the same cause, individuals should have a remedy denied to the aggregate of individuals called the public. But, as we remarked before, in this regard the judicial voice in America is less certain in tone than in England. We should be willing to follow the English rule in this State, unless there were a preponderance of American authority against it. But, fortunately, we find this wholesome jurisdiction sustained by the great weight of authority, and, with modern experience, we deem it only a question of time when it must be universally asserted and exercised." See Spooner v. McConnell, 1 McLean, 337; Atty. Genl. v. Hudson R.R. Co., 1 Stockton, 526; Atty. Genl. v. N. J. R.R. Co., 2 Green N. J. Ch. 136; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91; Sparhawk v. Union, etc., R.R. Co., 54 Id. 401; Bigelow v. Hartford Bridge Co., 14 Conn. 578; State v. New Haven, etc., Co., 45 Id. 331.

was not sufficiently adequate. If the defendants are carrying on banking operations contrary to law, they ought, undoubtedly, to be restrained ; but I cannot be of opinion that the operation is such a mischief or public nuisance as to require the immediate and extraordinary process of this court to abate it. When the question is whether a corporation has forfeited its charter, or usurped a franchise, or has broken a penal law, this court is not the proper tribunal to sustain the prosecution or inflict the punishment.”¹ A bill was filed by a stockholder against an insurance company, alleging, among other things, that the company had violated its charter, and praying for an injunction to restrain it from further operations, and for the appointment of a receiver of all of its property and effects, with a view, after the payment of debts, to a distribution among the stockholders, in fact to dissolve the corporation and wind up its affairs. The vice-chancellor held that if the parties stood in the relation of partners to each other, or as *cestui que trust* and trustee, he should have no doubt of the authority and duty of the court ; but that the corporation was not a trustee of the stockholders, nor did the parties occupy the relative position of partners, and that a court of equity had no power to interfere with the chartered rights and franchises of a corporation. On appeal, this view of the common law jurisdiction of a court of equity over a corporation for the breach of its charter was sustained by the chancellor.² A national bank having failed to

¹ Atty. Genl. v. Utica Ins. Co., 2 Johns. 371. See Atty. Genl. v. Bank of Niagara, Hopkins Ch. 354.

² Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 34; 2 Paige Ch. 438. See Hodges v. New England Screw Co., 1 R. I. 312. A proceeding in equity for the voluntary dissolution of a corporation, up to the point of dissolving the corporate body, is not, strictly speaking, a suit or cause, but a proceeding

by which the corporation is enabled to surrender its franchises under proper supervision, as corporations always could do in England, but, as in this country, cannot be done unless some provision is made by law. Receivers are not appointed until the corporation ceases to exist, and they are vested with all the rights and property of the corporation for every purpose except carrying on its business. Cady v. Knit

redeem its notes, the controller of the currency declared the bonds deposited with the government to secure the circulation forfeited, appointed a receiver, who took possession of the assets, and the affairs of the bank were being wound up. A creditor presented his claim to the receiver, who disallowed it, and he thereupon brought a suit on it against the bank. The suit was defended by the receiver on the ground that the proceedings of the controller in the premises had produced a forfeiture of the franchises and a dissolution of the corporation, and that therefore no suit could be maintained against it even to determine the validity of a demand by a creditor. It was held that the defense was opposed to the well-settled principles and analogies of the common law, and not sustained by any of the provisions of the currency act.¹ Where the complainant is a bondholder and stockholder of a railroad company which has been consolidated with other railroad companies, a court of equity has not jurisdiction to put an end by its decree to the existence of the consolidated company on the ground that it had its origin in a fraudulent design, and was created to answer a fraudulent purpose, that the proceedings for consolidation were defective, and that therefore the consolidation was not in fact legally effected.² In Indiana, the act of 1852 provided that whenever any judgment against a corporation should remain unpaid for the space of one year after its rendition, and execution was not stayed by appeal or supersedeas, the circuit court of the proper county should have power to declare the franchises of such corporation forfeited, and to appoint a receiver. This act was held

Goods Manf. Co., 48 Mich. 133; *In re New South Meeting House*, 13 Allen, 497.

¹ Nat. Pahquioque Bank v. First Nat. Bank of Bethel, 36 Conn. 325; aff'd 14 Wall. 383. In such a case both the bank and receiver may be made defendants to an action to establish the

claim of a creditor which has been rejected either by the controller or receiver. Green v. Walkill Nat. Bank, 7 Hun, 63. See Kennedy v. Gibson, 8 Wall. 506; Turner v. Bank of Keokuk, 26 Iowa, 262.

² Terhune v. Midland R.R. Co., 38 N. J. Eq. 423.

prospective in its operation, and not applicable to corporations in existence, which had previously been subject to no proceedings for non-payment, other than those applicable to natural persons.¹ In New York, laws were passed at an early day to provide: First, for suits in equity against corporations to restrain improper acts, and to dissolve them in certain cases on the prosecution of the attorney-general, or of injured persons interested as creditors; second, to enable the directors or other managers of a corporation to proceed by petition to have it dissolved whenever by reason of insolvency or other cause the corporate business could not be continued to the advantage of the parties concerned; the former being adverse to the corporate interests, and a proceeding in the ordinary character of a bill of complaint or information by a complaining party against the corporation as a defendant, while the latter was on behalf of the corporation itself to become relieved from corporate responsibility in the future.² In 1846 the legislature of

¹ Aurora, etc., Turnpike Co. v. Holt-house, 7 Ind. 59.

² It was said, in *Bank Commrs. v. Bank of Buffalo*, 6 Paige Ch. 497, that as the statute of New York relating to proceedings in equity against corporations contemplated the making of a final decree on a bill or petition against the corporation that was to deprive it of all of its property and powers, and as a receiver appointed in such a proceeding unless restrained in his powers by the order appointing him was vested with the corporate property and effects, and authorized to distribute the surplus among the stockholders after payment of the debts of the corporation, it followed that a final order or decree for the appointment of such a receiver was a virtual dissolution of the corporation. In an earlier case the same court held that the order appointing such a receiver was in effect a final order in the

cause, and, unless altered or revoked, operated a virtual dissolution of the corporation; that it was not a common law receivership, but that the receiver was a statutory assignee vested with nearly all of the powers and authority of the assignee of an insolvent debtor. The court pointed out the difference between such a receiver and a receiver under another section of the same statute, and under an earlier statute, which were strictly common law receivers, such as are usually appointed in suits between party and party, and who have no powers except such as are conferred upon them by the order of their appointment and the course and practice of the court. After the appointment of such a statutory receiver, the answer of the corporation under the corporate seal is of no effect, the corporation being virtually dissolved by the appointment, the statute substitut-

Tennessee passed an act giving the courts of chancery of the State jurisdiction to decree forfeitures for nonuse or abuse of corporate franchises; in cases of disability created by a surrender of them; and for other causes. The 8th section of the act provided that it should be lawful for the attorney-general to file a bill in the nature of a bill in equity in the court of chancery or circuit court to restrain by injunction any corporation from assuming or exercising any franchise not granted; to bring the directors, managers, and officers of a corporation, or the trustees of a fund given for public or charitable purposes, to an account for the management and disposition of the property confided to their care, and to remove such officers and trustees upon proof of misconduct; to secure for the benefit of all interested the property or funds; to set aside or restrain improper alienations; and generally to compel the performance of duty.¹ The statute of Rhode Island,² authorizing the court to intervene by injunction, and through a receivership to wind up the affairs of a bank when

ing the receiver for the corporation as to all of the corporate property and effects. *Verplanck v. Mercantile Ins. Co.*, 2 Paige Ch. 438. See *Davenport v. City Bank of Buffalo*, 9 Id. 12; *Ward v. Sea Ins. Co.*, 7 Id. 294.

¹ See *State v. Merchants' Ins. Co.*, 8 Humph. 235. In Louisiana, an act provides a remedy against usurpation, intrusion into, or the unlawful holding or exercising of a public office or franchise in the State; and the State may restrain by injunction persons who have joined in the avowed purpose of doing what is prohibited by law from carrying into effect their unlawful purposes, and from interfering with its agents in the execution of the legislative will. *State v. Fagan*, 22 La. Ann. 545. A bill in equity to restrain by injunction a corporation from assuming or exercising any franchise, or transacting any

business not allowed by the charter, is applicable only when the purpose is not to dissolve the corporation by a judicial decision, but to preserve it in order that its functions may be performed, and that it may not be able to abuse or transcend its powers. *Atty. Genl. v. Petersburg, etc., R.R. Co.*, 6 Ired. 456. An injunction may be granted against a corporation indebted to the plaintiff in a suit in equity to restrain the corporation from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution of them among its stockholders or any other persons, and from making any distribution or transfer of any of its effects. *Fish v. Union Pacific R.R. Co.*, 10 Blatchf. 518.

² Rev. Sts., ch. 126, sec. 47, pp. 290, 291.

it was so managing its concerns that the public, or those having funds in its custody, were in danger of being defrauded, did not intend that the bank commissioners should suppose, or that the court should find, in order to justify the action of either, a formed design on the part of the managers of a bank to cheat its creditors, but danger that the creditors might be defrauded by the management of the bank. The statute, looking to the power of banks to issue bills as currency, and the wide credit in this way so easily obtained by them, to their power to discount with its attendant power of inviting and, in one sense, of compelling deposits as implied conditions of accommodations by discount, regarded them as institutions which required constant supervision and control, lest, without any original formed design on the part of the directors, the bill-holders and depositors might by the mode of management be in danger of being defrauded.¹ In Massachusetts a bank was incorporated in 1836 to exist until 1851. In 1839 an act was passed providing for the appointment of commissioners, a majority of whom were authorized, in case they were of opinion upon examination that any bank was insolvent or had exceeded its powers, to apply to a judge of the court, who should issue an injunction to restrain the corporation from further proceeding with its business in whole or in part until a hearing could be had. It was held that the injunction contemplated was not the adjudication of a forfeiture, nor an entire suspension of the corporate functions, and as it might occasion only an inconsiderable interruption, it could not be deemed in any just sense a diminution of the time for which the bank was incorporated.²

§ 433. Proceedings to enforce forfeiture.—To enforce the forfeiture by a corporation of its charter, proceedings for

¹ Bank Commrs. v. R. I. Cent. Bank, 5 R. I. 12. ² Com. v. Farmers', etc., Bank, 21 Pick. 542.

that purpose must be instituted by the State, and unless the power to institute such proceedings be expressly delegated by law, the State alone possesses it.¹ But to change the rule a special act is not necessary. A general law may authorize such suits at the instance of private parties, or power may be conferred upon the governor of the State to cause the proceedings to be brought whenever he considers that the public interests so require.² In New York a statute provided, among other things, that all actions and proceedings against a corporation when the relief sought, or which could be granted therein, was the dissolution of the corporation or the removal or suspension of a director, should be brought by the attorney-general in the name of the people of the State.³ Before the passage of this act the courts of the State had been divided on the question whether or not an action to dissolve a corporation could be maintained by a stockholder when the corporation had remained insolvent for a year, or for that length of time had neglected or refused to pay and discharge its notes or other

¹ Atchafalaya Bank v. Dawson, 13 La. O. S. 497; State v. Fagan, 22 La. Ann. 545; Grand Gulf Bank v. Archer, 8 Sm. & Marsh, 151; N. J. Southern R.R. Co. v. Long Branch Commrs., 39 N. J. 28. Private persons cannot, in the absence of special laws, compel the performance of a duty to the public, when their interests are only in common with the public. A bill in equity was filed by the Buck Mountain Coal Company against the Lehigh Coal and Navigation Company to compel the latter to repair or reconstruct its works, and to compensate the plaintiff for loss sustained in transporting coal to market by reason of the non-repair of such works. No contract relation of any kind was alleged to exist between the parties, the claim of the plaintiff to equitable interposition rest-

ing alone upon the duty of the defendant to maintain its works in good order. It was held that the plaintiff was not the proper party to enforce this duty of the defendant to the public in the absence of special injury to the plaintiff; that is, any injury special in its operation, resulting from a failure to perform some specified duty to the plaintiff, or to make compensation for the injury resulting from the neglect, as contradistinguished from injury to the plaintiff in common with the whole public in the loss of a convenient and valuable highway. Buck Mt. Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91. See Spooner v. McConnell, 1 McLean, 337.

² State v. Consolidation Coal Co., 46 Md. 1.

³ Act of N. Y. of 1870, ch. 151, sec. 2.

evidences of debt, or for a year had suspended its ordinary and lawful business.¹ A turnpike company may be proceeded against by the State for a forfeiture of its charter although a creditor of the corporation has levied upon the franchise and acquired a right to the tolls for ninety-nine years. A creditor need not be made a party to such a proceeding, the State knowing no adverse party but the corporation.² If it is claimed that a corporation has forfeited its rights by misfeasance or nonfeasance, such forfeiture must be shown by the pleadings. The legal presumption is otherwise.³ When an act requires the grounds to be set forth on which a forfeiture is alleged to have been incurred, the information, like an indictment or declaration, should state with certainty to a common intent facts and circumstances which constitute the offence in its substance whether of misfeasance or nonfeasance; so that on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged.⁴ If the ground of forfeiture is that a turnpike company has neglected to keep its road in repair, it should be alleged that the company has permitted the road to get into such a condition as makes it dangerous or inconvenient to travelers, it not being sufficient merely to aver that the company has not kept and maintained its road in the manner particularly required by

¹ Wilmersdoerffer v. Lake Mahopac Imp. Co., 18 Hun, 387.

² Com. v. Tenth Mass. Turnp. Co., 5 Cushing, 509.

³ Atty. Genl. v. Bank of Michigan, Harrington Mich. Ch. 315. Where the prayer of the petition is that the corporation may be dissolved, a receiver of its property and assets be appointed with authority to sell the real estate, and, after payment of the corporate debts, that a decree be rendered for a distribution of the surplus among the

members according to their legal interest therein, the burden rests on the petitioners to make out a clear case of the inexpediency and impracticability of a longer continuance of the corporate trusts. *In re* New South Meeting House, 13 Allen, 497.

⁴ Atty. Genl. v. Petersburg, etc., R.R. Co., 6 Ired. 456; People v. Hillsdale & Chathan Turnp. Co., 23 Wend. 254; State v. Columbia, etc., Turnp. Co., 2 Sneed Tenn. 254.

the charter in regard to its width and the construction of its bed.¹ It is not an answer to an information against a turnpike company for nonfeasance, that individuals have a private action; or that the gates of the company may be thrown open by public officers; or that the company is liable to a penalty.² Upon the question whether the charter of a bridge corporation ought to be forfeited, it was held that evidence of the receipts, expenses, and cost of the bridge since the last return made, and as to the mode in which the bridge had been managed, how far it had accommodated the public wants, how far it was necessary to accomplish the future wants of the public, and how much the proprietors had received and expended, was proper.³ "To form a sufficient foundation for a judgment of ouster for the forfeiture of any franchise not originally usurped, but legally vested, the verdict must expressly find the party guilty of an unlawful holding by reason of some misuser or neglect going to pervert or destroy the object of the grant, or else of some misdemeanor in the trust injurious to the public. This should be made to appear affirmatively

¹ People v. Bristol, etc., Turnp. Co., 23 Wend. 222. On a proceeding in the nature of a *quo warranto* against a turnpike company, the defendant alleged that, after the charter was granted, the company constructed its road, which was approved by commissioners appointed by the governor of the State, who gave the company a license to maintain a turnpike and demand tolls. It was held that a reply that the road had not at any time within seven years after the company was incorporated been kept faced with gravel or broken stone of a given depth, so as to make a firm and even surface, as required by the charter, was sufficient, notwithstanding the approval and license. *Ibid.*, COWEN, J., dissenting.

² *Ibid.* On an information in the

nature of a *quo warranto*, calling upon certain parties to show cause by what warrant they maintained a bridge across a navigable river and exacted toll from passengers, the defendants answered that they were authorized to do so by an act of the legislature, with which they had in all respects complied. Issue having been taken upon exact and literal conformity with the statute, and found against the defendants, it was held that the plaintiffs were entitled to judgment of ouster; that if the defendants were compelled to admit a departure, they should have put the justification upon the record, and obtained judgment directly upon it. *People v. Thompson*, 21 Wend. 235, reversed 23 Id. 537.

³ *State v. Barron*, 58 N. H. 370.

on the record. But that can only be done by the ground or reason of forfeiture being charged and expressly found, either generally as to the unlawful holding, or specially as to some particular fact, conclusively showing a forfeiture and consequent unlawful holding.”¹

§ 434. Effect of dissolution.—An action against a corporation abates with its dissolution when no statutory authority at the time exists for the subsequent continuance of the action. After the dissolution of the corporation the power to proceed judicially against it in the action is wholly divested. A judgment thereafter recovered is not conclusive against any party, and is not within the provision of the Federal Constitution declaring that full faith and credit shall be given in each State to records and proceedings of every other State.² A defunct corporation, like a natural person who dies, cannot be brought into court by

¹ Thompson v. People, 23 Wend. 537, per VERPLANCK, Senator. A plea in abatement to an action by a corporation that the charter has been forfeited by misuser or nonuser, must show that the forfeiture has been judicially declared. “In the case of an individual, it is sufficient to aver his death. The cause or manner of his death need not be averred. Not so with a corporate body that has no natural existence, but which exists only by operation of law. The death of an individual is a simple fact. The dissolution of a corporation is a matter of law arising from the facts; and the facts that lead to the legal conclusion that the corporation is dissolved, must be averred in the plea.” John v. Farmers’ & Mechanics’ Bank, 2 Blackf. Ind. 367, per HOLMAN, J.

² McCulloch v. Norwood, 58 N. Y. 563; Matter of Norwood, 32 Hun, 196; Muma v. Potomac Co., 8 Pet. 284; City Ins. Co. v. Commercial Bank, 68 Ill. 348; Thornton v. Railroad Co., 123

Mass. 32; Muscatine Turn Verein v. Funck, 18 Iowa, 469; Saltmarsh v. Planters’, etc., Bank, 17 Ala. 761; Dobson v. Simonton, 86 N. C. 492; Terry v. Merchants’, etc., Bank, 66 Ga. 177; Miami Exporting Co. v. Gano, 13 Ohio, 269; Bank of La. v. Wilson, 19 La. Ann. 1; Bank of Miss. v. Wrenn, 3 Smedes & Marsh, 791; Ingraham v. Terry, 11 Humph. 572; Merrill v. Suffolk Bank, 31 Me. 57. See Grand Gulf Bank v. Jeffers, 12 Smedes & Marsh, 486; Fish v. Union Pacific R.R. Co., 10 Blatchf. 518; Platt v. Archer, 9 Id. 559; Kansas City Hotel Co. v. Sauer, 65 Mo. 279; Hart v. Boston, etc., R.R. Co., 40 Conn. 524. A judgment at common law, in the absence of a statute on the subject, against a dead person, either natural or artificial, is void, and the fact that service may have been obtained or the suit commenced before the death of the party, makes no difference in this respect.

process served upon persons who were officers or agents when the corporation was in existence. All such agencies, except as provided by statute, cease with its dissolution, and its property is then to be administered in accordance with the statutory provisions.¹ This was the rule from the earliest period of the common law to the seventeenth year of the reign of Charles II., when the British Parliament passed the first act modifying the common law on the subject.² In *Greeley v. Smith*,³ STORY, J., said: "I cannot distinguish between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case, the suit is abated at law unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor indeed could exist, without reviving the corporation *pro hac vice*, and, therefore, any suit pending against it at its death abates by mere operation of law." In a suit against a national bank to enforce the collection of a demand, the Supreme Court of the United States, in a subsequent case, said: "With the forfeiture of its rights, privileges, and franchises, the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended, and it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced, than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution.

¹ *Dobson v. Simonton*, *supra*.

² See *Life Assoc. of Am. v. Fassett*, 102 Ill. 315.

³ 3 Story, 657.

The prolongation of life for this specific purpose as much requires legislative enactment, as does the original creation of the corporation. No such enactment is found in the act of Congress authorizing the creation of national banks, and prescribing their powers, nor is there any provision elsewhere, that we are aware of, which would prevent the dissolution of the corporation from working the abatement of a suit pending against it at the time.¹ In Michigan, it was enacted that "All corporations whose charters shall expire by their own limitation or shall be annulled by forfeiture or otherwise, shall nevertheless continue to be bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which such corporations have been or may be established." "The dissolution of a corporation by a decree of the court, or by the expiration of its charter or otherwise, shall not abate any suit or proceeding in favor of such corporation which shall have been pending at the time of such dissolution; but all such suits or proceedings may be continued by the receivers who shall have been appointed for such corporation by the court, or by the trustees on whom the estate and effects of such corporation shall have devolved in the name of such corporation, or in the names of such receivers and trustees who may be substituted as plaintiff under the direction of the court in which the suit shall be pending, and subject to such order as the court may deem expedient in relation to the payment or security of costs."² In Illinois an act was passed in 1869

¹ Nat. Bank v. Colby, 21 Wall. 609. ² Genl. Sts. of Mich., ch. 55, sec. 8; See McCulloch v. Norwood, 36 N. Y. Ib., ch. 118, sec. 35. Super. Ct. (4 Jones & Spencer) 180; 58 N. Y. 563.

providing that all corporations created by special acts or under general laws, and whose charters or acts of incorporation might have expired for any reason whatever, should continue their corporate capacity during the term of two years for the sole purpose of collecting the debts due such corporations and selling and conveying the property.¹ In Alabama the dissolution of a corporation does not affect its right to sue and be sued until a lapse of five years after such dissolution.² Statutes similar to the foregoing exist in several of the States.³

Notwithstanding upon the repeal of a charter by the legislature the corporation may cease to exist so that no judgment can afterward be rendered against it in an action

¹ Session Laws of Ill., p. 1. See *Ramsey v. Peoria Marine, etc., Ins. Co.*, 55 Ill. 311; *St. Louis, etc., Coal & Mining Co. v. Sandoval Coal, etc., Co.*, 111 Id. 32.

² Rev. Code of Ala., sec. 1775. Some time before the passage of an act repealing the charter of a society, a person agreed to purchase of the corporation one share of its stock, and pay for the same the sum of one hundred dollars; but after the passage of the repealing act he refused to comply with his agreement, on the ground that the repeal had destroyed the corporation. In an action brought by the corporation to recover the sum agreed to be paid, the court below rendered judgment against the plaintiff. Held error, the corporation having done nothing to vitiate the contract of sale, and there being no express or implied warranty against a repeal of the act of incorporation. *Tuscaloosa Scientific, etc., Assoc. v. Green*, 48 Ala. 346.

³ In Massachusetts, by an act of the 24th of June, 1812, ch. 57, all banks incorporated under the authority of the State the corporate powers of which were limited by law to or at any time before the last day of October then

next ensuing, were authorized to remain corporations until the first Monday of October, 1816, and no longer, for the sole purpose of enabling such banks to settle their concerns and divide their capital. See *Crease v. Babcock*, 10 Metc. 525; *Folger v. Chase*, 18 Pick. 66; *Mariners' Bank v. Sewall*, 50 Me. 220; *Lea v. American, etc., R.R. Co.*, 3 Abb. Pr. N. S. 1; *Muscatine Turn Verein v. Funck*, 18 Iowa, 469; *Stetson v. City Bank*, 12 Ohio St. 577; *Blake v. Portsmouth, etc., R.R. Co.*, 39 N. H. 435; *Ingraham v. Terry*, 11 Humph. 572; *Michigan State Bank v. Gardner*, 15 Gray, 362; *Campbell v. Miss. Bank*, 6 How. Miss. 674; *Herron v. Vance*, 17 Ind. 595; *Welch v. St. Genevieve*, 1 Dillon, 130. A bank having offered to surrender its charter, an act accepting the surrender provided that the bank should continue for three years for the sole purpose of collecting what was owing it, paying its debts, closing up its business, and choosing directors for such purposes. It was held that a cashier appointed by directors so chosen was legally authorized to act in that capacity. *Cooper v. Curtis*, 30 Me. 488.

at law, such repeal does not impair the obligation of contracts made by the corporation during its existence, or prevent its creditors or stockholders from asserting their rights in a court of equity. Upon the repeal of the charter of a railroad company, the corporation was by statute continued a body corporate for the term of three years for the purpose of prosecuting and defending suits by or against it, closing its concerns, disposing of and conveying its property, and dividing its capital stock. The same statute provided that a court of equity might, on the application of a creditor or stockholder, at any time within the three years appoint a receiver, whose powers should continue as long as the court deemed necessary, to take charge of the corporate property, collect the debts, prosecute and defend suits, and do all other acts in the final settlement of the unfinished business that the corporation might have done if in being. No application having been made for the appointment of a receiver, it was held that the corporation at the expiration of the three years ceased to have any such existence that a valid judgment could be rendered against it in an action at law.¹ Although a forfeiture at common law does not operate to divest the title of the owner until by a judgment in a suit instituted for that purpose the rights of the State have been established, yet it is otherwise when the forfeiture is declared by a statute. In the latter case, the title to the thing forfeited immediately vests in the State upon the

¹ *Thornton v. Marginal Freight R.R. Co.*, 123 Mass. 32. See *Heath v. Barnmore*, 50 N. Y. 302; *Von Glahn v. De Rosset*, 81 N. C. 467; *Life Assoc. of Am. v. Fassett*, 102 Ill. 315; *Mariners' Bank v. Sewall*, 50 Me. 220; *Lothrop v. Stedman*, 13 Blatchf. 134; *Tuscaloosa, etc., Assoc. v. Green*, 48 Ala. 346; *Herron v. Vance*, 17 Ind. 595; *Blake v. Portsmouth, etc., R.R. Co.*, 39 N. H. 435. A corporation, subject to the provisions of the bankruptcy

act, which has committed an act of bankruptcy, and is in existence when the petition against it is filed, and when the papers are served on its officer, cannot oust the jurisdiction of the bankruptcy court to proceed on the return day to an adjudication of bankruptcy, because a decree dissolving the corporation has been made after such service and before such return day. *Platt v. Archer*, 9 Blatchf. 559.

commission of the offence or the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name.¹ In an action upon a policy of insurance on a vessel from New York to St. Bartholomew, and from thence back to New York, with liberty to touch and trade at Martinique, it appeared that the vessel stopped on her outward voyage at Martinique, discharged her cargo, and was taking on a return cargo, when she was driven on shore by a storm and lost. The plaintiff having obtained a verdict for a total loss, a new trial was granted on the ground that if the cargo which had been taken on was intended for the United States, it was a violation of the non-intercourse law, by which the vessel was forfeited, and the property immediately vested in the United States, so that the owners no longer had an insurable interest in her.² In an action against the American Art Union by a subscriber to it, the complaint alleged

¹ *Oakland v. Oakland, etc., R.R. Co.*, 45 Cal. 365. See *Dane v. Young*, 61 Me. 160; *Chesapeake, etc., Canal Co. v. Balt., etc., R.R. Co.*, 4 Gill & Johns.

^{1.} In *U. S. v. Grundy*, 3 Cranch, 337, Chief Justice MARSHALL said: "It has been proven that in all forfeitures accruing at common law nothing vests in the government until some legal step shall be taken for the assertion of its rights, after which for many purposes the doctrine of relation carries back the title to the commission of the offence; but the distinction taken by the counsel for the United States between forfeitures at common law and those accruing under a statute, is certainly a sound one. When a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature."

² *Fountain v. Phoenix Ins. Co.*, 11 Johns. 293. In an action of trespass against the governor of an English colony for seizing a vessel and cargo, the property of the plaintiff, the defendant pleaded that before the seizure the vessel and cargo had violated the navigation act, and had thereby become forfeited to the government. The plaintiff replied, that, without any sentence of condemnation by a court having competent jurisdiction, the defendant had sold and disposed of the vessel and cargo and converted the same to his own use. A demurrer to the replication was sustained on the ground that by the forfeiture, which the demurrer admitted, the title was divested, and the plaintiff could not therefore maintain the action, although the defendant had not proceeded to a condemnation. *Wilkins v. Despard*, 5 Term Rep. 112.

that the defendant was engaged in the distribution of art to its subscribers by means of a lottery or game of chance, and that unless it was restrained from making the distribution, the personal property of the association would be forfeited and lost to its members. The court said: "The entire property, if the annual distribution is a noxious lottery, before the complaint was filed, was, in my judgment, vested in the State. It was vested by force of the forfeiture which the statute declares of all property that shall be offered for sale or distribution contrary to its provisions,—a forfeiture which, by the express words of the law, may attach as well before as after the determination of the chance upon which the distribution depends."¹

The dissolution of a corporation puts an end to the transferable nature of the stock. It reduces the interests of the stockholders to a mere equitable right to their several distributive shares of the corporate funds, upon principles of equal justice and equity among all the stockholders. In an action against the trustees or directors of a joint stock corporation, by a stockholder, the complaint alleged the dissolution of the corporation by the defendants, pursuant to the articles of association, and that, in breach of their duty, and in fraud of the rights of the plaintiff and other stockholders, the defendants transferred the good-will of the corporate business and a large portion of the property to another corporation, and refused to distribute the assets among the stockholders. It appeared that a majority of the stockholders consented to the sale and transfer of the good-will and property before the joint stock association was dissolved, and that the dissolution was made to carry the arrangement into effect. It was held that the defendants, as trustees, were bound to exercise their powers and discharge their duties according to the known principles of law, by converting the assets into money, and dis-

¹ *Bennett v. Am. Art Union*, 5 Sandf. 614. See *Borland v. Lewis*, 43 Cal. 569.

tributing the proceeds among the stockholders; that the plaintiff, as against any misconduct of the trustees, might insist upon his rights with as much propriety as if he had owned a majority of the stock; that any misconduct of the trustees to the injury of the plaintiff, gave him a right of action therefor, notwithstanding they had acted, as they believed, in the interest of all of the stockholders, and in good faith; and that, as the defendants had been guilty of a breach of trust, they were liable to the plaintiff for damages.¹ If any of the stockholders are indebted to the corporation, such indebtedness must first be applied toward, or in part payment of, their distributive shares. This right to a distributive share of the fund being a mere chose in action, the owner cannot assign it to a third person so as to give the latter any greater or other interest than the assignor himself possessed.²

§ 435. Rights of creditors and corporators.—By the strict rule of the English common law, upon the dissolution or civil death of a corporation, its real estate reverts to the

¹ Frothingham v. Barney, 6 Hun, 366.

² James v. Woodruff, 10 Paige Ch. 541; aff'd 2 Denio, 574. "A dissolution is probably in every case a rescission of every contract, whether by or with a corporation. The corporation, whether absolutely defunct or merely in abeyance, as on the making of a winding-up order, is non-existent to the extent that no further rights can be acquired by or against it. Contracts are rescinded, but the rescission is a breach of them, not an excuse for their non-performance. Consequently, the parties thereto affected by such breach are entitled to damages for the breach, and can enforce such damages against the assets like other creditors. Apparently, however, nothing short of an actual order for dissolution—no pecuniary embarrassment, however great—works such a rescission, or will justify

a person in refusing to fulfil a contract with a corporation." Green's Brice's Ultra Vires, 2d Am. Ed. 803. There is a distinction between the invalidity of a contract resulting from the want of capacity to make it, and that arising from its being in violation of law, or contrary to public policy. In the former case, only the immediate parties to it, or the stockholders who are parties by representation, hold such a legal position in relation to it as to entitle them to raise the question of validity; while, in the latter, any person standing in a relation of interest to the subject-matter of the contract, and to be affected by its operation, may set up and insist on such fatal vice in it, for the purpose of clearing himself from the consequences of its being carried into effect. See *Vt. & Canada R.R. Co. v. Vt. Cent. R.R. Co.*, 34 Vt. 2.

original owners or their heirs, its personal property vests in the crown, and all debts due to or from it are, by operation of law, extinguished. The instances which support the *dictum* in reference to the land, consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all of their members; or of donations to public bodies, such as a mayor and commonalty. Blackstone says: "When a corporation is dissolved, the lands and tenements revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again. The grant is only during the life of the corporation, which may endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.¹ The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them in their natural capacities."² This harsh and in-

¹ This is the doctrine advanced by Coke. Co. Litt. 13 b. And see 2 Cruise, 493; Colchester v. Seaver, 3 Burr. 1866.

² 1 Blk. Com. 484. It was said by Sir Fletcher Norton, in his argument in the case of Colchester v. Seaver, *supra*, that the goods and chattels went to the crown. Kyd says: "What becomes of the personal estate is, perhaps, not decided, but probably it vests in the crown." 2 Kyd on Corp. 516. See State Bank v. State, 1 Blackf. Ind. 267; State v. Bank of South Carolina, 1 Spears S. C. 433. The common law doctrine that, on the dissolution of

a corporation, its debts became extinct, was held to be in force in North Carolina. Fox v. Horah, 1 Ired. Eq. 358; Mallory v. Mallett, 6 Jones N. C. 345. See Hopkins v. Whitesides, 1 Head. Tenn. 31; Robinson v. Lane, 19 Ga. 337. In Mississippi, in Commercial Bank v. Chambers, 8 Smedes & Marsh, 9, it was contended that even without the interposition of the legislature, the debts to and from the bank would have survived its dissolution; that these commercial corporations should be regarded as partnerships, and the fund or property owned by them a trust fund which equity would

equitable rule has not been favored by the courts or legislatures of this country, and it is doubtful whether it was ever adopted to the fullest extent here. "The rule of the common law has, in fact, become obsolete. It has never been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied."¹ It was held, in an early case, by the Supreme Court of the United States, that the creditors of a corporation, after its dissolution, might enforce their claims against any corporate property not in the hands of *bona fide* purchasers.² The same court subsequently said: "The withdrawal of the charter—that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals—is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf within the doctrine of chancery precedents. . . . The ac-

appropriate to the payment of their debts. To this the court replied that it might be deemed the settled doctrine that, on the dissolution of a banking corporation, the debts to and from it were extinguished, not by any implied condition in the contracts, but from necessity, because there was no person in whose favor or against whom they could be enforced. But see Commercial Bank v. State, 4 Smedes & Marsh, 439. In North Carolina, it was said, in State v. Rives, 5 Ired. 297, that, although it was generally true that upon the expiration of a corporation, or its dissolution, unless otherwise provided by statute, the real estate undisposed

of would revert to the donor, or original owner, yet that that was only true as to such estate as remained in the corporation at the moment of its dissolution, and did not apply to such as had been divested out of it, either by its own act, or by the act of law.

¹ 2 Kent's Com. 307. See Bank of Miss. v. Duncan, 56 Miss. 166; Coulter v. Robinson, 24 Id. 278; Curry v. Woodward, 53 Ala. 371; Newfoundland R.R., etc., Co. v. Schack, 40 N. J. Eq. 222; Com. v. Boston, 9 Gray, 451; Matter of Woven Tape Skirt Co., 8 Hun, 508; Lathrop v. Stedman, 13 Blatchf. 134.

² Mumma v. Potomac Co., 8 Pet. 281.

quisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed ; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion where the succession fails. . . . If the claims of the creditors are irresistible, those of the stockholders are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personality acquired by the corporation were purchased with the capital they lawfully contributed to a legitimate enterprise conducted by legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement ; but the State does not affirm that any cause for the confiscation of the property or for the infliction of a heavier penalty has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation and compel its application to the satisfaction of the demands which legitimately rest upon it.”¹ The legislature of New York at an early day, soon after the act authorizing the creation of manufacturing corporations, took measures to remedy the injustice of the common law rule by the statute of April 9, 1811,² which was re-enacted in the revision of 1830, providing that upon the dissolution of any corporation, unless other persons should be appointed by the legislature or other competent authority, the directors or managers of the affairs of such corporation should be the trustees of the creditors and stockholders of the dissolved corporation, with power to settle its concerns,

¹ Bacon v. Robertson, 18 How. 480, ² 1 N. Y. Rev. Laws, 148; N. Y. Rev. per CAMPBELL, J. See Life Assoc. v. Sts., 7th Ed., pp. 1531, 1532.
Fassett, 102 Ill. 315.

collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that should remain after the payment of necessary expenses. Chancellor WALWORTH, in an opinion delivered by him in the New York Court for the Correction of Errors in 1835 in a case not reported,¹ said: "The statutory provision, although rather obscure in its terms, evidently was intended to reach the real as well as the personal property of manufacturing companies which had been authorized to incorporate themselves under the general act passed a few days before." The same view is taken in Kent's Commentaries, in which it is said: "This is a just and wise provision, and gets rid altogether of the inequitable consequences of the rule of the common law."² In Owen v. Smith,³ it was contended that the New York act only reached the personal property and effects of the corporation owned by it at the time of its dissolution, and that the rule of the common law still applied to the real estate which reverted to the original grantors as before. It was held, however, that the real as well as the personal property of an extinct corporation vested in the receiver to be administered for the benefit of the creditors and stockholders. The court said: "There is nothing in the act to restrict the term to personality, and the equity of the creditors and stockholders is the same in respect to all species of property. In some corporations, as manufacturing corporations—as in the corporation in question—the principal, if not the entire property may be in realty, and there is no reason why that should be confiscated from the stockholders any more than

¹ *Ducro v. Spriggs.*

² 2 Kent's Com. 308, *Note C.* See *McLaren v. Pennington*, 1 Paige Ch. 102; *James v. Woodruff*, 10 Id. 541, aff'd 2 Denio, 574; *Erie*, etc., R.R. Co. v. *Casey*, 26 Pa. St. 287; *Powell v. North Missouri R.R. Co.*, 42 Mo. 63; *Heath v. Barmore*, 50 N. Y. 302;

Rexford v. Knight, 11 Id. 308; *Brooklyn Park Commrs. v. Armstrong*, 45 Id. 234; *Towar v. Hale*, 46 Barb. 361; *Plitt v. Cox*, 43 Pa. St. 486; *Haldeman v. Pennsylvania R.R. Co.*, 50 Id. 425; *Dingley v. Boston*, 100 Mass. 544. ³ 31 Barb. 641.

the personal property of a defunct banking corporation should be taken from its stockholders. The time of the passage of the act would seem to indicate that protection to creditors and stockholders in manufacturing corporations was chiefly in the mind of the legislature at the time of its passage, and, in that case, real property would not have been excluded. The term ‘property’ must be deemed and taken to have been used in its general and popular sense, and, so used, it includes both lands and chattels.”

While it is manifest that by its dissolution a corporation ceases to exist and can sustain the relations of neither creditor nor debtor toward others, and hence debts to or from it become extinct at law, it is nevertheless inequitable that creditors should remain unpaid when there are funds of the defunct corporation which ought to be applied in payment, simply for want of some legal being intervening between the creditors and debtors of the corporation with capacity to make the collection and adjustment. Acting upon the maxim that trusts shall not fail for want of a trustee, and regarding the property of a dissolved corporation as belonging to its creditors to the extent of their respective claims; a court of equity will collect the assets, though there be no strict legal owner to assert his right, and will appropriate and distribute them among the creditors and stockholders. In a late case in North Carolina the court said: “When a natural person dies, his rights and responsibilities devolve upon his personal representative, and survive and vest in him for a space sufficient to allow of all adjustment of his unsettled business relations and the distribution of the residue of his personal estate among those entitled. But for this provision of law, the same impediments would be met and the same consequences flow from the death of a natural person as of that of the ideal entity embodied in a corporation. The want of a

representative in the latter case with legal capacity to act obstructs the calling in and appropriation of its resources and means to discharge its obligations, and it is to supply this defect that equity interferes and enforces the appropriation."¹ The creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a *bona fide* purchaser. The property itself is affected with the trust. And if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock would in equity be held liable *pro rata* to contribute to the discharge of such debt out of the funds in his hands.² The directory of a literary institution borrowed money under an agreement that the indebtedness thus incurred should not create a lien on the property of the institution, but that the lenders should look for repayment only to the rents of the institution and the aid rendered it by the State. The debts were reduced by this means about one-half, when the buildings were consumed by fire, and no rents were afterward re-

¹ Von Glahn v. De Rosset, 81 N. C. 467. See McCoy v. Farmer, 65 Mo. 244; Acklin v. Paschal, 48 Texas, 147; St. Phillip's Church v. Zion, etc., Church, 23 S. C. 297; Bank of Miss. v. Duncan, 56 Miss. 166. It is a legitimate exercise of legislative power, in case either of violation by a corporation of its charter or of its insolvency, to provide a proper mode of ascertaining the facts by a judicial inquiry, in order to secure the assets of the delinquent institution for the payment of all of its creditors and an equal distribution of the surplus, if there be any, among the stockholders. The mode of proceeding to be directed is a matter of legislative discretion, subject only to the condition that it be fair and impartial, and calculated to secure and preserve the rights of all of the parties to

be affected by it. Com. v. Farmers', etc., Bank, 21 Pick. 542; Nashville Bank v. Petway, 3 Humph. Tenn. 522.

² Story's Eq. Juris., sec. 1252; Curson v. African Co., 1 Vernon, 121; S. C. Skinner Rep. 84; Wood v. Dummer, 3 Mason, 308; Broughton v. Pensacola, 93 U. S. (3 Otto) 266; Shamokin Valley, etc., R.R. Co. v. Malone, 85 Pa. St. 25; Hastings v. Drew, 50 How. Pr. 254; Woodfork v. Union Bank, 3 Coldw. Tenn. 488; Gaff v. Flesher, 33 Ohio St. 107. Upon the same principle courts of equity interfere to restrain the officers of a corporation from applying the corporate property to any illegal purpose, and to compel restitution when any illegal application has been made. Fisk v. Union Pacific R.R. Co., 10 Blatchf. 518.

ceived, no school being kept, nor the buildings re-erected. There had been subsequent to the fire no election of directors or officers, and the corporation had ceased to use its franchises and privileges. A decree for the payment of the indebtedness by a sale of the corporate property was affirmed.¹

It being a part of the settled policy of the law, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall be regarded as still existing for the purpose of settling their affairs, and having their property applied to the payment of their just debts, there is no good reason why the same policy should not, as far as practicable, be extended to foreign corporations having property here. Where an attachment was sued out in Illinois and levied on land in that State belonging to a foreign corporation, it was held that the attachment became an existing lien and security for the attaching creditors' claim, which could not be defeated by a decree dissolving the corporation and appointing a receiver, but that the corporation would be regarded, notwithstanding the decree, as still existing for the purposes of enforcing the attachment lien by judgment and execution.² When a State invests capital in a corporation, it becomes chargeable with the trusts and subject to the uses declared by the charter to the same extent, and for the same reasons, as if contributed by private persons. A State by becoming interested with others in a corporation,

¹ Morss v. Harpeth Academy, 7 Heiskell Tenn. 283.

² Life Assoc. of Am. v. Fassett, 102 Ill. 315. If it is attempted to wind up the concerns of a corporation the provisions of law calculated to apprise all interested of the fundamental changes about to be made in its government must be complied with, in order to give legal efficacy to the acts done.

The appointment and bonding of receivers does not work such a disability of the corporate property that it cannot be attached. Until the property is taken in charge by the receivers, the summary jurisdiction of the court cannot be interposed to punish those who may acquire a lien on it, or on portions of it, by execution or attachment. Farmers' Bank v. Beaston, 7 Gill & Johns. 421.

or by owning all of the capital stock, does not impart to the corporation any of its privileges or prerogatives. It lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege in respect to them not derived from the charter; and a law authorizing or requiring such a corporation to transfer its property to its sole stockholder, leaving its debts unpaid, would impair the obligation of its contracts.¹ The dissolution of a corporation does not, however, infringe the constitutional provision designed to preserve and protect the obligation of contracts, notwithstanding it may deprive creditors of all opportunity to collect their debts. The consistency of a dissolution with the constitution is maintained upon the idea that all persons deal with the corporation in reference to, and in contemplation of, its liability to dissolution.²

It seems scarcely necessary to say, though the proposition has been disputed, that the transfer or conveyance by a corporation which is solvent at the time, in good faith, of property previous to dissolution, will not afterward subject such property to the claims of creditors. A bill in equity

¹ Curran v. State, 15 How. 304; s.c. 7 Engl. Ark. 321. In New Hampshire it is provided by statute that no repeal by the legislature of the charter of any corporation "shall take away or impair any remedy given against such corporation, its members or officers, for any liability which shall have been previously incurred." Rev. Sts. of N. H., ch. 146, sec. 26; Ch. 48, sec. 2, of Laws of 1847; Comp. Laws, 319, 45. When a bank accepts a charter one of the provisions of which is that it shall pay the State a bonus, the bank cannot by making an assignment, or by any act of its own to which the State is not a party, absolve itself from its obligation. The lawfulness of the assignment may be conceded without

injury to the claim of the State. Bank of U. S. v. Com., 17 Pa. St. 400.

² Muunma v. Potomac Co., 8 Pet. 281; Mobile, etc., R.R. Co. v. State, 29 Ala. 573; Washington, etc., Turnp. R. v. Maryland, 19 Md. 239. When a corporation is in embarrassed circumstances, and in a country in which the corporation exists there is no constitutional prohibition forbidding the passing of laws impairing the obligation of contracts, a statute may compel individual bondholders of a domestic corporation, if agreed to by a majority of them, to accept a compromise for the benefit of all of the bondholders. Such statutes are on a footing with bankrupt acts. Canada Southern R.R. Co. v. Gebhard, 109 U. S. 527.

was filed against a manufacturing corporation, seeking to subject dividends previously paid to the stockholders to the satisfaction of judgments. There was no allegation in the bill that the corporation was insolvent when the dividends were declared, or that there was fraud or collusion to the injury of the complainants. At the time the dividends were made the corporation was doing a profitable business, and the property was amply sufficient for the payment of the corporate indebtedness. The factory was afterward destroyed by fire, and the corporation reduced from a state of prosperity to insolvency. It was held that creditors had no right to compel the stockholders to refund the dividends for the benefit of the former.¹ A railroad company, not being indebted in any considerable amount, sold certain of its lands not then needed for railroad purposes to one N. The officers of the company who took a leading part in negotiating the sale were charged to have been interested in the purchase, and to have furnished N. the means for effecting it. Shortly after it was made, N. conveyed the property for the original consideration to M., one of the officers referred to, who, retaining one-third part, conveyed the other two-thirds to L. and K., all of them being directors of the company, and members of the executive committee. The company did not question the fairness of the transaction. On a bill in equity filed by subsequent creditors to subject the lands to the satisfaction of their judgments, the main inquiry was whether the sale to N., made before the railroad company became indebted to the complainants, and when, for anything that appeared to the contrary, it was solvent, even though made for the use and benefit of its officers, could be set aside at the instance of the complainants for the purpose of subjecting the lands to sale under their execution. The court in answering this question in the negative, said: "It is a well-settled principle of law, that if an individual, being

¹ Reid v. Eaton Manf. Co., 40 Ga. 98.

solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made. . . . It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same."¹

¹ *Graham v. Railroad Co.*, 102 U. S. (12 Otto) 148. When, with reference to liability of corporate property to the payment of debts, the question is, whether the charter created a new corporation or merely continued the existence of an old one, such a construction must be given to the terms of the charter as is consistent with the legislative intent, and the intent of the corporators. The charter of a bank being about to expire, a new bank was incorporated with the same name, the same officers, and a major part of the same stockholders. It was held that the new bank was not liable for the

debts of the former one, in the absence of proof that the new charter was but a reincorporation or continuation of the charter of the old bank. STORY, J., said: "It is certainly true that a corporation may retain its personal identity although its members are perpetually changing; for it is its artificial character, powers, and franchises, and not the natural character of its members, which constitute that identity. And for the same reason corporations may be different, although the names, the officers, and the members of each are the same. An insurance company composed of the same natural persons

As the assets of a corporation are a trust fund for the security of the creditors, they should be distributed equally, without giving one set of creditors any preference over the others.¹ In *Rundel v. Life Assoc. of Amer-*

and officers, and with the same name as an existing incorporated bank, would still be a different corporation from the bank. The similarity of name, of officers, or of members, or even of objects, cannot then, *per se*, establish the identity of corporations created at different times by different charters, and having a distinct independent being. And one corporation may transact the business and pay the debts of another corporation without thereby merging in the latter its distinct corporate existence." *Bellows v. Hallowell & Augusta Bank*, 2 Mason, 31. A charter having been granted to one Mead to construct a turnpike road, after doing some work upon it, he forfeited the charter. Subsequently another turnpike company was incorporated under an act which provided that the work done by Mead should be valued, and that a certificate for stock in the new company to the amount of the valuation should be issued to him, which was done. A meeting of the stockholders was had, and directors and a president elected. No money was paid by the stockholders, nothing more was done, and the enterprise again failed through lapse of time. Mead was one of the directors. On a bill in equity filed by Mead to compel the new company to pay him the amount of the valuation for the work done by him under the first charter, the court, in holding that he was not entitled to the relief asked, said: "If such a claim could be maintained in any case, it surely cannot be in one like this. Mead performed no labor, and expended no money in any contract with this corporation on the faith of the stock sub-

scribed by others. The work done by him was under a previous charter to himself, and for his own benefit, and he could hold no one liable for it. It was lost by his own fault in not complying with his charter. But the equitable provision was inserted in the new charter for his benefit so far as to make him a stockholder to the extent of his demand for work done. Upon the failure of the second charter, he was in no worse condition than before, and could have no legal or equitable demand against any one. Nor is there any principle upon which he can be relieved upon the ground that the new board of directors did not do their duty in going on with the road. He was one of the board, and as much in fault as the others if the charter was lost by want of action on their part." *Hopkins v. Whitesides*, 1 Head. Tenn. 31.

¹ *Sawyer v. Hoag*, 17 Wall. 610; *Bradwell v. Farwell*, 1 Holmes, 433; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Smith v. Lansing*, 22 N. Y. 521; *Allen v. Montgomery R.R. Co.*, 11 Ala. 451; *San Francisco, etc., R.R. Co. v. Bee*, 48 Cal. 398; *Lexington, etc., Ins. Co. v. Page*, 17 B. Mon. 412; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; *Bewer v. Mich. Salt Assoc.*, 58 Id. 351; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639. See *Catlin v. Eagle Bank*, 6 Conn. 233; *Ringo v. Biscoe*, 13 Ark. 563. A statute provided that all securities belonging to a corporation deposited with the receiver should be converted into cash by him with the least possible delay, and that within a certain time of his appointment he should

ica,¹ the defendant was a mutual life insurance corporation created by and domiciled in the State of Missouri, but transacting extensive business in Louisiana and other States; and it had a large fund in Louisiana in the hands of a receiver. The corporation had been dissolved, and the defendant, W., who upon its dissolution was vested by the charter with all of its property, and was charged as superintendent with the duty of winding up its affairs, was in possession of the corporate assets in Missouri under a decree rendered in a previous case. The complainants urged that, as to the funds in the hands of the receiver, the Louisiana creditors had a preference for payment, or at least the right to have the funds retained by him as security that the amount due them would be paid. The superintendent, W., insisted that under the law creating the corporation the whole of the assets upon its dissolution passed into his hands. The Louisiana creditors were such only by virtue of being members of the corporation. As members they had assented to the laws of Missouri creating the corporation, which laws, upon the dissolution of the corporation, controlled the settlement of its affairs. The court said: "There must be a common method by which the amount due by or to each policy-holder shall be ascertained, and this must be done by a common representative. This is the contract to which the plaintiffs bound themselves when they subjected themselves to the operation of the organic law of the corporation by becoming members of it. They cannot, therefore, now ask the court to protect them in the exercise of a right which they expressly

declare a dividend of the cash in his hands among the creditors; that if any debts remained unsatisfied within thirty days after declaring such dividend, which was called the first dividend, he should render an account of his proceedings including the names of the stockholders. Upon this report being made, the justice was required to

direct a reference for the apportionment of the unsatisfied debts among the stockholders. It was held that the accountable assets in the hands of the receiver were to be actually converted, and go into the first dividend, before resorting to the personal liability. Matter of the Reciprocity Bank, 22 N. Y. 9.

¹ 4 Woods C. C. 94.

relinquished. The effect which is wrought by this contract and assent to the laws of the State of Missouri, makes the territorial extent of the authority of the superintendent to administer, coextensive with the authority of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law. The decree must, therefore, be for the defendant as superintendent, directing the receiver to turn over to him all the property of the corporation, to be administered under the laws of the State of Missouri, and remitting the complainants to the court which decreed the dissolution. It must provide that, before this is done, all the expenses of the administration up to this time, including the compensation of the receiver and the costs in this cause, be paid by the defendant as trustee.”¹

§ 436. Renewal of corporate powers.—It may be important to determine whether a reorganization of a corporate body takes place after its dissolution, or merely during the suspension of the original body, and whether the statute revives an old or creates a new corporation. To ascertain this, the terms of the charter creating a new corporation must be considered, and a construction given them consistent with the legislative intent, and the intent of the corporators. Corporations may be different, although the names, the officers, and the members of each are the same. The similarity of name, or even of objects, cannot *per se* establish the identity of corporations created at different times by different charters, and having a distinct, independent being; and one corporation may transact the business and pay the debts of another corporation, without thereby merging in the latter its distinct corporate existence.²

¹ Reed v. Boston Machine Co., 140 Mass. 454. See Brewster v. Burnett, 125 Mass. 68; Am. Tube Works v. Boston Machine Co., 139 Id. 5; Kent v. Bornstein, 12 Allen, 342.

² Bellows v. Hallowell & Augusta Bank, 2 Mason, 31. The Bank of the State of Missouri, by reorganizing under the act of Congress making provision for a national currency, (U. S.

When the corporation is dissolved, or its corporate existence terminated by the expiration of the time for which it was created, it cannot, at least without the consent of the corporators, be revived.¹ The mere act of creating a corporation by complying with the simple requirements of the law on that subject does not, when the franchise has never been used, and all rights under it have been abandoned, occasion such a legal disability, in the persons who have formed it, to create a new corporation for different purposes, though under the same name, as will make all acts, though done in fact in the exercise of the new franchise, regarded, in the eye of the law, as having been performed under the old and abandoned one, because the formality of a technical dissolution of the first corporation was not observed; nor the acts of the new corporate body be deemed to have been done under the first franchise, because the second corporation was organized before a copy of the certificate was filed in the office of the secretary of state.²

It is sometimes difficult to determine whether or not a corporation is a new and independent body, or an old one,

Sts. at Large, ch. 106, p. 112, sec. 44,) neither lost any of its assets, nor escaped any of its liabilities; the change being a transition, and not a new creation. Coffey v. Nat. Bank of Missouri, 46 Mo. 140. See Grocers' Nat. Bank v. Clark, 48 Barb. 26; Thorp v. Weggeforth, 56 Pa. St. 82; State v. Nat. Bank of Balt., 33 Md. 75.

¹ People v. Manhattan Co., 9 Wend. 381; Farrington v. Tennessee, 95 U. S. 679; Sinking Fund Cases, 99 Id. 700; Ireland v. Palestine, etc., Turnp. Co., 19 Ohio St. 369. See Cross v. Peach Bottom R.R. Co., 90 Pa. St. 392.

² Hyde v. Doe, 4 Sawyer, 133. The reconstruction of an insolvent company was attempted, on the basis of forming a new company, to assume the liabilities and take the assets of the old

company. The shareholders were requested to assent to the proposal by signing a form of approval containing the terms of the plan, and the plan was carried out by resolutions passed at an extraordinary meeting of the company, duly confirmed at a subsequent meeting, and by a deed, to which the liquidators of the old company and the two companies were parties. It was held that, as the creditors of the old company were not parties to the arrangement, a shareholder who had signed the circular expressing his assent to the plan, and exchanged his shares, was not entitled to treat the instalments paid upon his debentures as being in reduction of his liability to the old company. Jeaffreson, *ex parte*, L. R. 11, Eq. 109.

with new and superadded powers and privileges. But when it is settled that it is a new creation, it follows, in the absence of any provision in the statute creating it to that effect, that it is not liable for the debts of the old corporation.¹ An agreement was entered into between the bondholders, all of the stockholders, and most of the unsecured creditors of a railroad company, reciting the default of the company in paying interest, and the threatened sale of its property, and that, for the protection of their several and respective interests in the property from loss and sacrifice, they desired to unite for the purpose of bidding on the property, should it be offered for sale, and of purchasing it for and on their respective accounts, and to organize a new company. It proceeded to classify the parties to the contract according to the nature of their several claims, and stated the sum each should pay toward the purchase of the property, and the character of the bonds the bondholders should be entitled to in the corporation to be formed, and the shares of the capital stock therein, to which each member should be entitled. It was held that the agreement was not illegal or improper, and that it did not establish a constructive trust on the part of the new corporation for the discharge of the liabilities of the old company.² In Wisconsin, the first section of a statute under which a corporation was organized, was as follows: "Any person, company, or association, which shall have or may become

¹ Marshall v. Western N. C. R.R. Co., 92 N. C. 322. See Railroad Co. v. Rollins, 82 N. C. 523; Young v. Rollins, 85 Id. 485; Dobson v. Simonton, 86 Id. 492; Code of N. C., secs. 667, 668. In Texas, the purchasers of the property of a railroad company succeed to all the company's rights, powers, and privileges, and may continue business in its name. Acres v. Moyne, 59 Texas, 623. See Houston, etc., R.R. Co. v. Shirley, 54 Id. 125.

A mere change in the corporate name does not affect the rights or liabilities of a corporation. If the act of the legislature making the change reserves these liabilities and rights, the reservation is no more than the affirmation of what the law would have implied in its absence. Trustees of University v. Moody, 62 Ala. 389.

² Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576. See Smith v. Chicago & North Western R.R. Co., 18 Wis. 17.

the owner or assignee of the rights, powers, privileges, and franchises of any company, association, or corporation, created or organized by or under the laws of this State, by purchase or sale under a mortgage sale, or on any bankrupt sale, or on any sale in any bankrupt proceedings, or on any sale under any judgment, order, decree, or proceedings of any court in this State, including the United States courts, shall be entitled to, and may at any time within two years after such purchase, reorganize under the charter or act of incorporation or law under which such company or association was created or organized, and shall have the same rights, powers, privileges, and franchises, such company, association, or corporation had or was entitled to at the time of such purchase or sale."¹ It was held that there was nothing in the act which furnished any ground for the proposition that the new company had succeeded to the liabilities of the old one, unless it was the provision that the purchasers of the franchise might reorganize under the charter of the original company ; but the court was of the opinion that all this provision meant was that the new corporation might use the machinery of the original charter to perfect its organization.²

¹ St. of Wis. of 1872, ch. 115, secs. 1788, 1789. See *Robinson v. Phila., etc., R.R. Co.*, 28 Fed. Rep. 340.

² *Neff v. Wolf River Boom Co.*, 50 Wis. 585. See *Slight v. Gutzlass*, 35 Wis. 675. At common law a judgment of seizure in a *quo warranto* information or proceeding against the franchises of a corporation, either by charter or prescription, did not operate to dissolve the corporation, but only to suspend its regular operation during the pleasure of the crown, and, notwithstanding such judgment of seizure, the corporation could be revived by a new charter which would operate to make the new body in all respects identical

with the old one as regarded debts, liabilities, etc.; and this though the name and the constitution of the body politic were altered by the new charter. The usual practice upon such seizure was, for the crown to appoint a *custos*, who discharged all the functions, duties, etc., of the corporation until the restitution of the franchise or the revival of the corporation. Such revival was a continuation of the old corporation, and the revived corporation was obliged to take the act or charter of revival with all of the debts, liabilities, and rights of action of the old one, though there might be additional powers and regulations contained in the charter of

"The inhibition of the constitution which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission ; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of or escape from liabilities the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs ; and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."¹

revival. Grant on Corp. 300, 303, 304 ; Lea v. Am. Atlantic & Pacific Canal Co., 3 Abb. Pr. N. S. 1.

¹ Broughton v. Pensacola, 93 U. S. 266, per FIELD, J. See Milner v. Pensacola, 2 Woods, 632. A town was incorporated in 1821. In 1841 an act was passed repealing the charter of 1821 and all acts amending the same. In 1844 the act of 1841 was repealed, and the act of 1821 and its amendments were revived and declared to be in full force. An action having been brought to recover a debt due from the town at the time of the repeal of the charter in 1841, it was held that the act of repeal, when accepted by the corporation, constituted a dissolution ; that upon com-

mon law principles, independent of any statute establishing a different rule, upon the dissolution of a corporation the debts due to and from it were extinguished ; that the act of 1844 was a new creation, a new act of incorporation, and not a mere continuation of the former charter ; that a corporation which had been actually dissolved, using the word dissolution in its true sense to signify extinction, could not be revived ; and that it was error for the court below to charge that the act of 1844 was a revival of the corporation of 1821, and that as such it was a revival of all of the liabilities of such corporation. Port Gibson v. Moore, 13 Smedes & Marsh, 157. See Colchester v.

When there is a purchase at a mortgage foreclosure sale, the property and franchises of an older corporation does not operate to bind the new corporation to abide by or perform the contracts of the old one, unless they are a lien upon the property and franchises purchased.¹ The object of the statute of Michigan of 1859, in relation to mortgages against railroad companies, was to place a railroad and its appurtenances sold under a mortgage under the entire control of the new stockholders and their representatives, freed from all debts not secured by lien or mortgage, under the same conditions, and with the same rights, as if they had been the original stockholders of a road which was not burdened with debt.² In Connecticut, irrespective of legislative or judicial authority in the special instance, the effect of foreclosure is to vest absolutely the property of the mortgagor in the mortgagee. It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mortgagee stands with reference to the mortgaged property in the same relation as did the mortgagor. He has the title of the former owner of the equity, and nothing more. He holds the property subject to all charges, duties, pledges, and equities existing prior to the execution of the mortgage deed.³

Seaber, 3 Burr. 1866; Colchester v. Brooke, 7 Q. B. 339; Commercial Bank v. Lockwood, 2 Harring. Del. 8; Exeter Bank v. Rogers, 7 N. H. 21; Union Canal Co. v. Young, 1 Wharton Pa. 410; Frankfort Bank v. Johnson, 23 Me. 322.

¹ Menasha v. Milwaukee & Northern R.R. Co., 52 Wis. 414; Lake Erie & Western R.R. Co. v. Griffin, 92 Ind. 487. See Gilman v. Sheboygan, etc., R.R. Co., 37 Wis. 317; Sts. of Wis. of 1878, sec. 1820; Sappington v. Little Rock, etc., R.R. Co., 37 Ark. 23. As to the right of a stockholder of a railroad company, upon the reorganization of the company after the sale of its

property under a mortgage, to join the new company thus formed, see Vatable v. New York, Lake Erie, etc., R.R. Co., 96 N. Y. 49, reversing S. C. 11 Abb. N. C. 133.

² Cook v. Detroit, etc., R.R. Co., 43 Mich. 349. See Hammond v. Port Royal, etc., R.R. Co., 15 S. C. 10; 8. C. 16 Id. 567; Thornton v. Wabash R.R. Co., 81 N. Y. 462; Harpending v. Munson, 91 Id. 650; Child v. New York, etc., R.R. Co., 129 Mass. 170.

³ Gates v. Boston & N. Y. Air Line R.R. Co., 53 Conn. 333. It was said by the Supreme Court of the United States, in Shaw v. Railroad Co., 100 U. S. 605, per WAITE, Ch. J., that

When the members of a corporation form a new corporate body, and the property of the old is transferred to the new corporation in order to hinder, delay, and defraud the creditors of the former, the property thus fraudulently conveyed may be taken on execution as that of the original body; but the new corporation may be treated as having been lawfully created by its *bona fide* creditors.¹

"The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage with a lien superior to the old, raise the money which is required, without asking the courts to engage in

the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases; while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution." See Canada Southern R.R. Co. v. Gebhard, 109 U. S. 527.

¹ Booth v. Bunce, 33 Barb. 137. See Blair v. St. Louis, etc., R.R. Co., 22 Fed. Rep. 36; Mason v. Pewabic, etc., Co., 25 Id. 882; San Francisco, etc., R.R. Co. v. Bee, 48 Cal. 398.

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